TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 428

C. S. TUTTLE, ALBERT J. PETERSON, ET AL., ETC.,
PETITIONERS,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1935.

CERTIORARI GRANTED OCTOBER 21, 1935.

SUPREME COURT OF THE UNITED STATES

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[fols. a-d & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 59143

In the Matter of GRANADA HOTEL CORPORATION, Debtor

Be It Remembered, that the above-entitled action was commenced by the filing of the following Creditors Petition in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 14th day of March, 1935.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS

No. 2613-D

In the Matter of GRANADA HOTEL CORPORATION, Debtor

CREDITOR'S PETITION IN PROCEEDINGS FOR THE RELIEF OF DEBTORS UNDER SECTIONS 77A AND 77B OF THE BANKRUPTCY ACT

To the Honorable Judges of the United States District Court for the State of Illinois:

Your petitioners, Sam Harris, J. Rose and I. Gordon, hereby petition the Court and allege:

I

That your petitioners are creditors of the Granada Hotel Corporation, having provable claims, which in the aggregate, are in excess of the value of securities held by them, amount to One Thousand ($1,000.00) Dollars. That the nature and amount of your petitioners' claims are as follows:

That the petitioner Sam Harris, is the owner and holder of Five Hundred ($500.00) Dollars, principal amount of

[fol. 3] the gold bonds executed and issued by the debtor under date of September 1st, 1928, which is in default both as to principal and interest since March 1st, 1934, when they were due and payable.

That the petitioner J. Rose is the owner and holder of Five Hundred ($500.00) Dollars, principal amount of the gold bonds executed and issued by the debtor under date of September 1st, 1928, which is in default both as to principal and interest since March 1st, 1934, when they were due and payable.

That the petitioner, I. Gordon, is the owner and holder of Three Thousand ($3,000.00) Dollars, principal amount of the gold bonds executed and issued by the debtor under date of September 1st, 1928, which is in default both as to principal and interest since March 1st, 1934, when they were due and payable.

II

That the debtor is a corporation which could become a bankrupt under Section 4 of the Act of Congress entitled "An Act to establish a uniform system of Bankruptcy throughout the United States, approved July 1st, 1898, and Acts amendatory and supplementary thereto" and is a corporation which might file a petition under Sections 77A and 77B of said Bankruptcy Act.

That the debtor is a business or commercial corporation organized in pursuance of the laws of the State of Illinois and is not a municipal, insurance, banking, or building and loan corporation, or a railroad corporation, and the present operation of said debtor does not exclude it from the provisions of Section 77B of the said Bankruptcy Act, and said debtor corporation is neither a wage earner nor a person engaged principally in farming or tilling of the soil.

III

That the property of the debtor consists of the following described property, located in the City of Chicago, County of Cook and State of Illinois:

Lots 32 and 33 in Outlot "C" in Wrightwood, in Section 28, Township 40 North, Range 14, East of the Third Principal Meridian, situated in the County of Cook, State of Illinois.

[fol. 4] That in addition thereto, the debtor corporation has certain interests in the following buildings in the City of Chicago, State of Illinois:

Fullerton Plaza Building Corporation
The Parkway Building Corporation
The Lincoln Park Manor Building Corporation
The Arlington Apartment Building Corporation.

That the debtor corporation owns equities in several farms in the State of Indiana, which are known as:

The Bush Farm
The Rust Farm
The Pogue Farm
The L. W. Campbell Farm
The O'Mara Farm.

That it also owns equities in several farms in the State of Michigan, known as:

The Kipp-Holbrook Farm.

That it also owns equities in several farms in the State of Missouri and a large number of equities in Duplexes in Kansas City, Missouri:

400-02 E. Meyer Blvd.
408-10 E. Meyer Blvd.
416-18 E. Meyer Blvd.
4814-16 Wornall Road
503-05 Ward Parkway
509-11 Ward Parkway
515-17 Ward Parkway
521-23 Ward Parkway
527-29 Ward Parkway
533-35 Ward Parkway
4939 Ward Parkway (Residence)
4943 Ward Parkway "
4947 Ward Parkway
Vacant, Lot "A."

IV

That the debtor has had its principal place of business and its principal assets in the State of Illinois and in the Northern District of Illinois, in the six (6) months immedi-

ately preceding the date of this petition, although its assets are scattered throughout the various states aforesaid.

[fol. 5]

V

The nature of the business of the debtor is principally that of owning, managing, operating, renting and leasing farms, residential properties, hotel buildings and other premises in the City of Kansas City, Missouri, and elsewhere in Missouri; in the State of Michigan and in the City of Chicago, State of Illinois.

VI

That the debtor corporation has not filed in this nor any other Court, a petition or answer under Sections 77a and 77b of said Bankruptcy Act and has never filed any petition in bankruptcy and that this Court is one in which said debtor might itself, file a petition under said Act.

VII

That the debtor corporation is unable to meet its debts as they mature.

VIII

That the said debtor is within the jurisdiction of this Court under the provisions of said Bankruptcy Act, That heretofore William A. Thuma brought a suit in the Superior Court of Cook County, Illinois, Number 519151, against the said Granada Hotel Corporation, debtor, and other parties, in pursuance of which the Chicago Title and Trust Company was named as Receiver of the assets and property of the debtor, which proceedings are still pending in said Superior Court.

IX

That so far as your petitioners have been able to ascertain, no other proceedings, in law or in equity, or in any other Court, have been instituted in relation to said debtor, with the view to the appointment of trustees or receivers, either on behalf of the debtor or its creditors.

X

That your petitioners propose that the debtor corporation shall effect a reorganization under and pursuant to

[fol. 6] Section 77a and 77b of the Bankruptcy Act, a plan for which said reorganization, your petitioners have and are ready, willing and able to submit to the Court in the due course of these proceedings.

XI

This petition is made and presented to this Court in good faith, is not collusive nor for the purpose of obtaining any preference or improper advantage of any one creditor over any other.

XII

On information and belief, your petitioners allege that certain creditors of said debtor and officials of said debtor corporation, entered into a plan, scheme, design and conspiracy to defraud the bondholders (including your petitioners) of this corporation. That pursuant to said conspiracy to defraud, that said creditors and officials have wrongfully and illegally diverted and appropriated monies and profits to their own advantage and preferment which rightfully belonged and belong to your petitioners and other similarly situated. That irreparable loss will ensue to your petitioners unless they and other creditors of said debtor be given the fair and equitable relief and remedies given by virtue of Sections 77a and 77b of the Bankruptcy Act, as amended, in pursuance of which this petition is filed, and your petitioners pray that this court compel said debtor and said conspirators to make full and complete disclosure under the discovery powers of this Court, of their machinations and overt acts in their manipulation and exploitation or the business of said debtor to the disparagement and detriment of all creditors.

XIII

Your petitioners therefor request and petition the Court as follows:

(a) That service of this petition with subpœna may be made upon said debtor as provided by said Bankruptcy Act, and that the debtor be required to make answer to said petition within ten (10) days after service upon it.

(b) That this petition be approved and proceedings be had in this Court in pursuance of said Sections 77a and 77b of the Bankruptcy Act.

[fol. 7] (c) That a trustee or trustees of the debtor's estate be appointed in pursuance of said Act. That said trustees be required to give such notice to the creditors and stockholders of the debtor as the Court shall direct of a hearing to be had as provided in said Act.

(d) That the amount of the bonds of the trustees be fixed and upon filing of such bonds, the trustees exercise such supervision and control of the property of the debtor as the Court shall order and direct. That said trustees be empowered to manage the continuation and operation of the business of the debtor in such manner as the Court shall direct. That in the handling of the business of the debtor the trustees shall be authorized to issue certificates for cash, property or for any lawful purpose, all in pursuance of the direction of the Court.

(e) That said debtor and said trustees be required to prepare a list of all known bondholders and creditors of, or payments against, the debtor corporation or its property and the amounts and character of their debts, claims, securities and liens, if any they have, together with the post office address or place of business of each creditor or claimant, and also a list of the stockholders of each class of the debtor corporation, with the last known post office address or place of business of each, which information shall be open to the inspection of any creditor or stockholder of the debtor corporation, upon application to the trustees.

(f) That the order of this Court be entered, directing the rejection of contracts of the debtor, executory in whole or in part, which are not beneficial to the estate of the debtor.

(g) That a reasonable time be fixed by order of the Court within which the claims and interest of the bondholders, creditors and stockholders may be filed and after which no such claim or interest may participate in any plan except on order for cause shown.

(h) That an order be entered herein staying all proceedings of every character and in every Court which may now be pending against the debtor and enjoining the commence-

ment or continuation of any suits or proceedings of any character against the debtor, until the final disposition of this matter and upon notice and for cause shown enjoining and staying the commencement or continuation of any judicial proceedings to enforce any lien upon the estate of the debtor corporation or any part thereof.

(i) That your petitioners be permitted to submit one or [fol. 8] more plans for reorganization of the business of the debtor including any disposition to be made of its assets and properties pursuant to Sections 77a and 77b of said Bankruptcy Act, and that reasonable time be given to your petitioners in which to submit such plan. That after hearing such objections as may be made to any plan submitted by your petitioners, that the Court shall confirm the plan, if satisfied that it complies with said Sections 77a and 77b of said Bankruptcy Act.

(j) That your petitioners have such other, further and equitable relief as to the Court may seem just and proper in the premises.

Dated the 13th day of December, A. D. 1934.

Sam Harris, Joe Rose, I. Gordon, Petitioners. Frank E. McAllister, Attorney for Petitioners.

Duly sworn to by Sam Harris et al. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

(Caption—2613D)

SUBPŒNA—Issued Dec. 21, 1934

To Granada Hotel Corporation, of Chicago, Cook County and the Northern District of Illinois Greeting:

For certain causes offered before the District Court of the United States of America within and for the Eastern District of Illinois, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you shall answer within ten days, after the service of this subpœna and a copy of the petition filed by Sam Harris, Joe Rose and I. Gordon, (for

certain relief under Sections 77a and 77b of the Bankruptcy Act of 1898, as amended and supplemented) in our said Court praying, and to do further and receive that which our said District Court shall consider in this behalf. And this you are in nowise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable Walter C. Lindley, Judge of said Court, and the seal thereof, at Danville in said District, this 21st day of December A. D. 1934.

D. H. Reed, Clerk, by Marie Burnett, Deputy Clerk.
(Seal.)

Served this writ on the within named Granada Hotel Corporation, a corporation, by delivering a copy thereof to Roger W. Walters, Assistant Secretary an agent of said corporation this 28th day of December 1934. The President of said corporation not found in my District.

Wm. H. McDonnell, U. S. Marshal, by Charles A. Sintak.

Marshal's Fees:

1 service	$2.00
3 miles	.24
Total	$2.24

[fol. 10] In United States District Court

(Caption—2613D)

Notice of Motion—Filed Jan. 18, 1935

To George U. Nichols, Vice-President of the Granada Hotel Corporation, 2015 Lincoln Avenue, Chicago, Illinois:

Please Take Notice that on Friday the 18th day of January, A. D. 1935, at the opening of Court in the forenoon or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Walter C. Lindley, sitting at Chicago, Illinois, in the Federal Building, Adams and Clark Streets, and then and there move the Court for:—

1. For an Order defaulting the Debtor Corporation for failure to file an answer;

2. For an Order appointing a temporary trustee to take possession of all the property of the Debtor Corporation;

3. For an injunction restraining the further prosecution of the case of William A. Thuma, Complainant vs. Granada Hotel Corporation, et al. Defendants and Central Republic Trust Company, etc., Cross-Complainant vs. Granada Hotel Corporation et al., Cross-Defendants, No. 519151 in the Superior Court of Cook County, Illinois;

4. For an Order setting the date for hearing upon the question of the permanent appointment of the trustee or in the alternative restoring the Debtor in possession;

5. For an Order setting the date for the proposal and submission of Plans and further date for the hearing of the Plan or Plans submitted and objection thereto;

6. For the entry of an Order approving the Petition of the Petitioning Creditors as being properly filed and in good faith;

and for such further Orders as to the Court may seem meet; at which time and place you may appear if you so see fit.

Yours etc., Frank E. McAllister, 4215—One No. La Salle St., Chicago, Ill., Attorney for Petitioning Creditors.

[fol. 11] Received a copy of the above notice this 17th day of January A. D. 1935.

G. U. Nichols.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Caption—2613D)

INTERVENING PETITION OF CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS TRUSTEE—Filed Jan. 22, 1935

Now comes City National Bank and Trust Company of Chicago, and leave of court being first had and obtained

and for the purpose of its special and limited appearance heretofore entered herein, represents:

1. That on the 29th day of April, 1929, Granada Hotel Corporation was the owner of the real estate and premises described as

Lots 32 and 33 of Out Lot "C' in Wrightwood, a Subdivision of the Southwest Quarter of Section 28, Township 49 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois,

among other things subject to a first mortgage bond issue of $525,000 secured by trust deed to Chicago Trust Company, as Trustee, recorded in the Recorder's Office of Cook County, Illinois, October 1, 1928, as Document 10161996; that the apartments in the improvement on said premises were furnished and that the said improvement was operated as an apartment hotel, but that the interest of the said corporation in and to the said furniture and equipment was subject to the lien of a chattel mortgage held by Albert Pick & Company.

2. That on April 29, 1929, Granada Hotel Corporation, by its warranty deed, conveyed the said real estate and premises to Granada Apartments, Inc., which said deed was [fol. 12] duly delivered and recorded in the Recorder's Office of Cook County, Illinois, at or about the date thereof, and that on April 29, 1929, Granada Hotel Corporation assigned and transferred to Granada Apartments, Inc. all of its right, title and interest in and to all property of every kind whatsoever held or owned by it or in which it might have any right, title, interest or claim.

3. That on April 29, 1929 as aforesaid, Granada Hotel Corporation disposed of all of its assets and property and that thereafter on the 7th day of May, 1930, it was dissolved by decree of the Superior Court of Cook County, Illinois, entered in cause there pending as No. 50985, at the instance of the People of the State of Illinois in an action brought through the Attorney General for the State of Illinois, and that said decree has never been reversed, vacated or modified in any way.

4. That on the 10th day of June, 1930, proceedings for the partial foreclosure of a mortgage upon the above real

estate and premises were filed in the Superior Court of Cook County, Illinois, in cause No. 519151, and Chicago Title and Trust Company was appointed Receiver in said proceedings; that thereafter Central Republic Trust Company, as successor by consolidation to said Chicago Trust Company under said Document 10161996, filed its cross-bill of complaint for the foreclosure of the first mortgage, which proceedings are still pending and undetermined.

5. That on June 24, 1930, an order was entered in said cause No. 519151 on the petition of Albert Pick & Company, directing Chicago Title and Trust Company, Receiver, to surrender to Albert Pick & Company any and all personal property belonging to Granada Hotel Corporation, and that the said Receiver did surrender said personal property.

6. That before and after the entry of the order requiring the surrender of said personal property, Granada Apartments, Inc. purchased sufficient personal property fully to refurnish said apartment hotel and that Granada Apartments, Inc. and others, by chattel mortgage, transferred to Central Republic Trust Company all their right, title and interest in the new personal property as further security for the payment of indebtedness of Granada Apartments, Inc. and as further security for the payment of the bonds secured by said Document 10161996.

7. That thereupon Central Republic Trust Company filed its supplemental cross-bill in the said state court proceedings for the foreclosure not only of said Document 10161996, [fol. 13] but also of its said chattel mortgage aforesaid, and that said proceedings are still pending and undetermined.

8. That on the 16th day of March, 1934, by order of the Superior Court of Cook County, Chicago Title and Trust Company, as such Receiver, was directed to and did surrende possession of said real estate and personal property to Central Republic Trust Company, as Trustee, which took possession thereof and held it until January 3, 1935 under the terms of its trust deed and as mortgagee in possession after condition broken.

9. That on January 3, 1935, by order of said Superior Court of Cook County entered in the said proceeding, City National Bank and Trust Company of Chicago, your peti-

tioner herein, was appointed Successor Trustee, and as such Successor Trustee on January 3, 1935 took possession from Central Republic Trust Company, and has since been, and is now, in possession of said property.

10. That on April 24, 1934, Chicago Title and Trust Company presented its final report and account in the said state court proceedings, which report and account were approved and the said Receiver was discharged by order entered that day in said proceedings.

11. That by reason of the premises, your petitioner avers that the debtor corporation has no right, title or interest in and to said real estate or personal property, and further avers that there is in existence no corporation known as Granada Hotel Corporation.

12. That on the 18th day of January, 1935, the petitioning creditors herein applied for an order appointing a Temporary Trustee to take possession of the property of the debtor corporation described in the original petition herein and for an injunction restraining the further prosecution of said state court cause No. 519151 and for an order upon the question of the permanent possession of the Trustee, or in the alternative, restoring the debtor to possession.

13. Your petitioner asserts a claim adverse to that of the debtor corporation, the petitioning creditors and any Trustee which may be appointed herein, and avers that it has not consented to an adjudication of the title to said real estate or said personal property or to the possession thereof by this court in a summary proceeding; that a controversy exists with reference to said real estate and personal property and that this court is without jurisdiction or right in [fol. 14] law to summarily order any Trustee herein to take possession of said real estate or said personal property, and without jurisdiction to restrain the prosecution of said proceedings cause No. 519151 which relate to property in which the debtor corporation has no right, title, interest or claim.

14. That the taking of possession of said real estate or personal property or any jurisdiction thereof by this court in view of the facts herein shown would be a violation of the Fifth Amendment to the Constitution of the United States of America.

Wherefore, your petitioner asserts an adverse claim and controversy in reference to said real estate and personal property held adversely as aforesaid and that the motion of the petitioning creditors herein for an order appointing a Temporary Trustee to take possession of the said property, for an injunction restraining the prosecution of said cause No. 519151 and for an order setting the date for hearing upon the question of the permanent appointment of the Trustee, or in the alternative, restoring the debtor to possession, should be denied.

City National Bank and Trust Company of Chicago, by Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Its Attorneys. Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Attorneys for said Intervening Petitioner.

Duly sworn to by Vincent O'Brien. Jurat omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

(Caption—2613D)

ANSWER OF C. S. TUTTLE, ET AL., TO THE ORIGINAL PETITION OF SAM HARRIS, ET AL.—Filed Jan. 22, 1935

Now come C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as members of a Committee constituted under the terms of the deposit agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, and for answer to the origina petition filed herein say:

1. That there have been deposited with them under the terms of said deposit agreement first mortgage bonds of Granada Hotel Corporation in excess of $300,000. principal amount, and that under and by virtue of the terms and provisions of the said agreement full and complete title, legal and equitable, in and to the said bonds has been and is vested in these respondents, by reason of which they are creditors of Granada Hotel Corporation having provable claims which they aver in the aggregate are in excess of the value of the securities held by them to the sum of One Thousand Dollars ($1,000) or over.

2. They are not informed as to the averments set forth in paragraphs numbered 1 of the said petition, but they admit the averments contained in paragraph 2 thereof.

3. They deny that the said debtor is within the jurisdiction of the court under the provisions of the Bankruptcy Act, but admit that there is pending in the Superior Court of Cook County the said cause there numbered 519151 described in paragraph 8 of the said petition; they admit that during the pendency of said proceeding Chicago Title and Trust Company was named Receiver therein, but aver that at the time of the filing of the petition herein Chicago Title and Trust Company was not acting as Receiver, and further [fol. 16] aver that on the 16th day of March, 1934 an order was entered in said Cause No. 519151 directing said Chicago Title and Trust Company, as Receiver, forthwith to surrender to Central Republic Trust Company, as Trustee under trust deed recorded in the Recorder's Office of Cook County, Illinois as Document 10161996, all property in its possession as such Receiver, and further aver that the said trust deed Document 10161996 is the trust deed securing the issue of first mortgage bonds hereinabove mentioned. They further aver that the said Receiver did, pursuant to said order, so surrender possession to said Central Republic Trust Company, as Trustee, and that said Trustee held possession as mortgagee in possession after condition broken until the 3rd day of January, 1935, on which date City National Bank and Trust Company of Chicago was appointed Successor Trustee to Central Republic Trust Company by order of said Superior Court of Cook County, Illinois entered in said Cause 519151, and that on the 3rd day of January, 1935 possession of the property involved in the said proceeding numbered 519151 was surrendered to, and is now held by, City National Bank and Trust Company of Chicago as such Successor Trustee and as mortgagee in possession after condition broken.

4. Your respondents further aver that on the 24th day of April, 1934 the final account and report of Chicago Title and Trust Company as such Receiver was filed in said Cause 519151 and approved by the court therein, and that the said Receiver was by order of court entered on the date last aforesaid duly discharged.

Wherefore, and from the facts appearing in the original petition herein, these respondents say that the petitioners are without right to file their said petition, that the court is without jurisdiction to entertain it, that it should not be approved as properly filed, and should be dismissed.

C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, E. A. Kilmer, by Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Their Attorneys. Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Attorneys for said Respondents.

[fol. 17] *Duly sworn to by Vincent O'Brien. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

(Caption—2613D)

PETITION OF CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS TRUSTEE, FOR LEAVE TO INTERVENE—Filed Jan. 22, 1935

Now comes City National Bank and Trust Company of Chicago, as Successor Trustee under trust deed recorded in the Recorder's Office of Cook County, Illinois, as Document 10161996, by its attorneys, Don Kenneth Jones and Defrees, Buckingham, Jones & Hoffman, and pursuant to its special and limited appearance heretofore entered herein and without waiving or intending to waive its objections to the jurisdiction of the court or in anywise the benefit of the said special and limited appearance, but to enable it to show to the court that the property hereinafter referred to is not and has not since April 29, 1929 been the property of the debtor herein but has since that time been owned and possessed by others and adversely to the debtor herein, petitions the court for leave to intervene herein, and says:

1. That the said Document 10161996 is a trust deed in [fol. 18] the nature of a mortgage securing first mortgage bonds upon the property involved herein and described as

Lots 32 and 33 in Outlot "C" in Wrightwood, a Subdivision of the Southwest quarter of Section 28, Township 40 North, Range 14 East of the Third Principal Meridian, in the County of Cook, and State of Illinois,

and that your petitioner's interest is as Successor Trustee under the said Document.

2. That as such Successor Trustee it is in possession of said property and has been since January 3, 1935 as mortgagee in possession after condition broken.

3. That it and its predecessor in trust acquired such possession by order of the Superior Court of Cook County entered March 16, 1934 in cause pending in the Superior Court of Cook County, Illinois as number 519151, and that in and by the said order Chicago Title and Trust Company, the then acting Receiver in said cause last aforesaid, was directed to surrender possession of the said property to your petitioner's predecessor in trust, and that it did so surrender such possession and was discharged as such Receiver in said cause on the 24th day of April, 1934.

4. That by warranty deed dated April 29, 1929 Granada Hotel Corporation conveyed the above described real estate to Granada Apartments, Inc., an Illinois corporation, which latter corporation has owned the said premises ever since.

5. That your petitioner as such Trustee is likewise in possession of all of the personal property and equipment used in and about the improvement on the above described premises and took such possession more than four months preceding the filing of the petition herein, and that it holds such possession as chattel mortgagee, and that the debtor herein never had any right, title, interest, or claim in, to or upon the said personal property and equipment, all of which your petitioner avers was purchased by other parties in interest long after the debtor herein had parted with title to the said real estate.

Wherefore, your petitioner, for the purposes aforesaid, prays that it be granted leave to intervene and to file instanter its intervening petition herewith presented.

City National Bank and Trust Company of Chicago, as Successor Trustee, by Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Its Attorneys. Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Attorneys for said Petitioner.

[fol. 19] *Duly sworn to by Vincent O'Brien. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

(Caption—2613D)

ORDER GRANTING LEAVE TO FILE ANSWER—Entered Jan. 22, 1935

On motion of Don Kenneth Jones, attorney for C. S. Tuttle and others;

It Is Ordered that leave be, and it is hereby, granted C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as members of a Committee constituted under the terms of the deposit agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, to file instanter their answer to the original petition herein.

Enter.

Walter C. Lindley, Judge.

Dated January 22, 1935.

[fol. 20] IN UNITED STATES DISTRICT COURT

(Caption—2613D)

ORDER GRANTING LEAVE TO INTERVENE—Entered Jan. 22, 1935

This matter coming on to be heard upon the petition of City National Bank and Trust Company of Chicago, as Successor Trustee, for leave to intervene and to file its intervening petition in pursuance of its special and limited appearance heretofore entered herein and for the purposes thereof;

It Is Ordered that leave be, and it is hereby, given City National Bank and Trust Company of Chicago, as Successor Trustee, to intervene herein and to file instanter its intervening petition now submitted in open court.

Enter.

Walter C. Lindley, Judge.

Dated January 22, 1935.

IN UNITED STATES DISTRICT COURT

(Caption—2613D)

ORDER THAT DEBTOR BE DEFAULTED, ETC.—Jan. 22, 1935

This cause coming on to be heard upon the motion of Frank E. McAllister, attorney for the petitioning creditors in the above entitled cause, and due notice having been [fol. 21] given all parties in interest, and the court having heard the arguments of counsel and being fully advised in the premises, doth find:

1. That on the 21st day of December 1934 an involuntary petition for reorganization of the debtor corporation was filed by Sam Harris, J. Rose and I. Gordon;

2. That on towit, the 28th day of December 1934 a copy of the subpoena and petition was served on the debtor corporation by the United States Marshall by personally serving and leaving a copy of the same with Roger W. Walters, Assistant Secretary of the debtor corporation and that more than ten (10) days have elapsed since said service and that no answer has been filed thereto by the debtor corporation;

3. That on towit, the 17th day of January 1935 a notice was served personally upon George U. Nichols, Vice-President of the Granada Hotel Corporation, that on the 18th day of January 1935, Frank E. McAllister, attorney for the petitioning creditors would appear before the Honorable Walter C. Lindley, sitting at Chicago, Illinois in the Federal Building Clark and Adams Streets, and then and there move the Court for an Order defaulting the debtor corporation for failure to file an answer to the petition of Sam Harris, J. Rose and I. Gordon.

It Is Therefore Ordered Adjudged and Decreed that the debtor in the above entitled cause, Granada Hotel Corporation, be and they are hereby defaulted for their failure to file an answer to the petition of Sam Harris, J. Rose and I. Gordon.

Enter.

Walter C. Lindley, Judge.

Dated Chicago, Illinois, January 22nd, 1935.

[File endorsement omitted.]

[fol. 22] In United States District Court

(Caption—2613D)

Special and Limited Appearance—Filed Jan. 22, 1935

Now comes City National Bank and Trust Company of Chicago, a corporation, as Successor Trustee under trust deed recorded in the Recorder's Office of Cook County, Illinois as Document 10161996, by its attorneys, Don Kenneth Jones and Defrees, Buckingham, Jones & Hoffman, and enters its special and limited appearance herein for the sole and only purpose of contesting the jurisdiction of this court over the property hereinafter referred to; for the purpose of questioning the jurisdiction of the court to appoint a Trustee herein to take possession of all or any of the property described in the original petition herein; for the purpose of questioning the jurisdiction of the court to restore to the debtor herein possession of all or any of said property, and for the purpose of contesting the jurisdiction of the court to order the surrender of said property to this court, to any trustee herein, or to the debtor herein, by a summary proceeding. It contests the jurisdiction on the ground that the debtor corporation has not held title to the property described as

Lots 32 and 33 of Outlot "C" in Wrightwood, a Subdivision of the Southwest quarter of Section 28, Township 40 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois,

since April 29, 1929, and that it never did have title or any interest of any kind whatsoever in the personal property and equipment used in connection with the said real estate and located in the improvement thereon, and that said last described real estate and said personal property and equipment are both owned and possessed adversely to the alleged debtor herein.

Dated January 22, 1935.

Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Attorneys for City National Bank and Trust Company of Chicago, as Trustee aforesaid.

[fol. 23] IN UNITED STATES DISTRICT COURT

(Caption—2613 and 59143)

Transcript of Proceedings—Filed April 5, 1935

Before Lindley, J., January 22, 1935

IN UNITED STATES DISTRICT COURT

(Caption—2613)

TRANSCRIPT OF PROCEEDINGS

The following is a transcript of the proceedings had and evidence taken in the above entitled cause before Hon. Walter C. Lindley, one of the Judges of said Court (sitting in the United States Court House, at Chicago, in the Northern District of Illinois, Eastern Division) beginning at the hour of 10:00 o'clock A. M. on the 22d day of January, A. D. 1935.

Present: Frank E. McAllister, Esq., Morris Schaeffer, Esq., and Thomas V. Sullivan, Esq., appearing for Petitioners;

Messrs. Defrees, Buckingham, Jones & Hoffman, represented by Don Kenneth Jones, Esq., and Vincent O'Brien, Esq., appearing for C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm and E. A. Kilmer, as members of a Committee, for City National Bank and Trust Companies of Chicago, Trustee, upon special and limited appearance.

COLLOQUY

Mr. McAllister: This is a case, your Honor, on which we came in Friday, and the Court ordered the debtor defaulted. There is no appearance on behalf of any one and we have an order of default and the petitioning creditors are ready to prove up our good faith.

The Court: Let them be sworn, one of them, at least.

Mr. Jones: If your Honor please, before we enter upon that, I represent a committee for $300,000.00 of the bond [fol. 24] issue, and I am asking leave to file an answer on behalf of that committee. That committee, under that particular deposit, holds title to the bonds, and I have just

listened to what your Honor has had to say in the other case.

In the Cisco case in the United States Supreme Court it was held they were proper parties in an equity proceeding. I am familiar with that. And the Supreme Court of Illinois has just ruled that they have title to bonds, and are bondholders. Now the purpose of my asking leave to file this answer is to attack the jurisdiction of the court, not upon the grounds that have been so often advanced, and I am familiar with your Honor's ruling upon these particular problems; but upon this ground, and whether I am given leave to file the answer or not, I take it that there is one thing there is firmly settled in federal jurisprudence, that whenever the court's attention is directed to the fact that it is without jurisdiction, through defect in pleadings, or otherwise, that it always notices that fact, even upon its own motion.

The Court: It is its duty.

Mr. Jones: Now the petition, which is at bar, does not allege an act of bankruptcy on the part of the corporation. It does allege that there was a receiver, and that there is a receiver in an equity case, a foreclosure in the state court. By the answer, which is verified, and which I tender to your Honor, it appears that at the time of the filing of this petition under 77B there was no equity receivership in the state court. While it was true that a year or two years ago an equity receiver had been appointed, yet over a year or approximately one year ago that receiver was discharged. And I offer to prove that by certified copies of the court records in the very case referred to in this petition. There is no equity receivership pending of the type referred to in 77B, so that without either an equity receivership at the time this petition was filed, or an act of bankruptcy alleged in the petition itself, the court, as I conceive it, is without jurisdiction.

Therefore, I would like to call those facts to the attention of the Court by the answer before we proceed with the other witnesses, and ask leave to file the verified answer, and have here to exhibit to the Court certified copies of the orders of the state court in 1934 prior to this petition, discharging the receiver in that case.

[fol. 25] The Court: What became of the property in the foreclosure case?

Mr. Jones: The foreclosure case is still pending. The receiver was discharged, and the trustee under the first mortgage bond issue took possession of the property, and is in possession today. But there is no equity receivership, and there is no receiver for this corporation or of this corporation's property. And that is jurisdictional, as I read 77B.

The Court: Yes, if we agreed upon what is the meaning of the term receivership. What have you to say?

Mr. McAllister: That receivership proceeding is still pending, it is still a pending equity proceeding.

The Court: Aren't there some court decisions to that effect?

Mr. Jones: I know of none.

The Court: I have read some, somewhere, that such a situation is within the meaning of the words, an equity receivership, in the sense they are used.

Mr. Jones: There can't be an equity receivership.

The Court: Suppose you call the fiduciary a guardian or an administrator, he is in by order of the state court as a trustee.

Mr. Jones: We are not in by order of the state court as trustee.

The Court: But you are a party, you are the complainant there.

Mr. Jones: That is it.

The Court: And as the complainant you have taken possession, and you are subject to that court's order.

Mr. Jones: Sure.

The Court: And you can't do anything with that property that that court disapproves of. You are as much subject to the jurisdiction of that court as if you were called a receiver.

Mr. Jones: We are subject to that court's jurisdiction, but outside of that, under all rules of real estate in Illinois a trustee, where condition is broken, can go in and take possession.

The Court: Certainly, he may maintain ejectment.

Mr. Jones: Any one of the three remedies. But we have no equity receivership.

The Court: Well, that is a question.

Mr. Schaeffer: The bill prayed for the appointment of a [fol. 26] receiver, and the receiver was appointed. It indi-

cates the character of the proceeding. The mere fact that they saw fit to take out a receiver and substitute a trustee, under the order of the court, don't change it from an equity receivership proceeding to something else.

The Court: I am perfectly willing to give you, Mr. Jones, such record as you want to make on the subject, because these questions are new and not well settled. But I have reasoned this way, that if a trustee under a bond issue has filed a suit at law to foreclose upon its bond, has gone into possession of the property, either through a receiver appointed by that court, or taken possession as trustee under the terms of the mortgage or trust deed, and the foreclosure proceeding is still pending, Congress meant that that situation should be taken care of. That was the intent,—what Congress had in mind.

Now I may be all wrong, but that is the way I have reasoned to my own satisfaction, and if I am wrong, I want the Court of Appeals to tell me so, and I would be very happy to have you get your record in such shape that the matter may be presented there.

Mr. Jones: I have prepared a draft order which gives me leave to file the answer.

Mr. McAllister: We object to the answer being filed at this time, on the grounds that the Committee which counsel represents has no standing at this time to controvert the petition. The debtor is the sole and only party under the Act, or three creditors possessing the requisite amount of bonds. The Bondholders' Committee, as such, has no standing at this time, if the Court please, to controvert the petition.

Mr. Jones: It would be a very narrow construction that would deny any one the right to call attention of the court——

The Court: I think anybody may call those facts to the court's attention.

Mr. McAllister: This takes them to be a party to the proceeding, and under the Act they are not proper parties.

Mr. Schaeffer: That is not a matter of offering affirmatively on the face of the petition, that is a matter of affirmative proof.

The Court: Gentlemen, this answer purports to raise only the question of jurisdiction of this court under the particular facts that Mr. Jones has stated, and that is the only point that it does raise, as I understand it.

[fol. 27] Mr. Jones: Yes.

The Court: I agree with you that Congress evidently had in mind upon the question of good faith, filing in good faith, they would permit certain people who are directly interested, certain designated people who are interested in the res of the property to be heard and that it would be improper to deny them the right to be heard; that they may appear, and contest the good faith of the petition, and that by the exclusion of all others, Congress had in mind that upon that subject matter the court should hear only such designated parties. It has been by position that in such situation and after, under that procedure, the petition shall have been approved, then the Bondholders' Committee, trustee, or other parties in interest may appear by way of intervention for the purpose of calling to the court's attention all matters that may be proper, in the disposition of the contentions of the parties or the protection of the various rights and interests in the property, in subordination of the original proceedings.

Now this application is for leave to file an answer which submits to the court just one question, that is, whether,—when a trustee has filed a suit to foreclose and a receiver has been appointed to take possession of the property and has held possession for some time, and the trustee under the trust deed has been put in possession under the terms of the trust deed and the receiver discharged,—whether the foreclosure suit is still pending. The trustee under the trust deed is still in possession of the property. Whether in such case, that kind of a case is within the meaning of the words "equity receivership," as used in the Statute. Now that raises a question of construction of the Act, and a determination of the court's jurisdiction.

I will allow the answer for that purpose.

Mr. Jones: I will offer in evidence, as part of the answer, if the Court please——

The Court: Wait a minute, I want to hear the evidence upon this petition first. I mean the evidence upon the petition; petitioners have the burden of proof.

Mr. Jones: Very well, your Honor.

The Court: I don't understand that there is any contest about it, but I want to be sure of the good faith in filing the petition.

Mr. Schaeffer: The only thing, I was going to invite your Honor's attention to that. Three creditors have the right to come in and file an answer controverting the petition.

[fol. 28] The Court: The proper procedure for the trustee is to file after the petition has been approved, an intervening petition to set up these facts and to ask the court to refrain from taking jurisdiction of that property, as property not within the meaning of the Act. But after all, it is a matter of choice of remedies, and I am not very meticulous about that.

Call your witnesses.

Isidore Gordon, called as a witness in behalf of the Petitioners, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Sullivan:

Q. What is your name?
A. Isidore Gordon.
Q. Where do you reside?
A. 3402 Harrison Street.
Q. Mr. Gordon, did you purchase bonds of the Granada Hotel Corporation?
A. Yes.
Q. In what amount?
A. Three thousand.
Q. $3,000.00?
A. Yes.
Q. Handing you a series of bonds, Granada Hotel Corporation bonds, are those the bonds that you bought (handing documents to witness)?
A. Yes, sir.
Q. And are you now the owner and holder of them?
A. Yes, sir.
Q. Did you buy them for investment purposes?
A. I did, sir.
Q. And having bought them for investment purposes you have held them for that purpose?
A. Yes.
Q. Have the bonds defaulted?
A. I know it now.
Q. Sir?

A. I know it now.

Q. You know that the bonds have defaulted?

A. Yes.

[fol. 29] Q. And you know the interest and principal has not been paid?

A. Yes, sir.

Q. And you signed this petition?

A. Yes, sir.

Q. Under 77B, for the purpose of reorganizing this corporation?

A. Yes, sir.

Q. And are you sincere in your belief that it would be beneficial to the bondholders to have this corporation reorganized in this court?

A. I actually believe it.

Mr. Sullivan: That is all.

The Court:

Q. What is your business, Mr. Gordon?

A. I have a paint store, and also painting and decorating.

The Court:

Q. Do you know why this proceeding was filed in the Eastern District of Illinois, how did you determine that?

A. I left it to the counsel.

The Court:

Q. Did you discuss that proposition with them?

A. I discussed in the way in which I have more faith in the federal court than in the state.

The Court:

Q. It appears this proceeding was instituted in the Eastern District, instead of the Northern District. Do you know why that was done?

A. No.

Mr. Sullivan:

Q. You do know this corporation owns property other places than in the City of Chicago?

A. Yes, sir.

Q. You know that they own property in Kansas City, and some in Michigan?
A. Yes, sir.

The Court: The same corporation?
Mr. Sullivan: The same corporation.

The Court:

Q. What is this property here?
A. A hotel.

The Court:

Q. Where is it located?
A. I never was there.

The Court:

Q. You have not seen it?
A. No.

The Court:

Q. You don't know the size of it?
A. No.

The Court:

Q. Nor the total of the issue?
[fol. 30] A. No, sir.

The Court: Do you wish to inquire?
Mr. Jones: I do, but I have no right to.
The Court: You have the right to ask him anything you want to about the state proceedings.

Cross-examination.

By Mr. Jones:

Q. When did you buy your bonds?
A. 1931.
Q. Who did you buy them from?
A. I got it from a general contractor.
Q. A general contractor?
A. Yes.
Q. Do you remember his name?
A. I believe his name is Korshak.

The Court:

Q. Was he a man that built the hotel?
A. No, I have been doing work for him.

Mr. Jones:

Q. Where does he live?
A. He used to live on Douglas Boulevard.
Q. How long since you have seen him?
A. Oh, several, about a couple years.
Q. Whereabouts did he live on Douglas Boulevard?
A. Somewheres around 3600 block.
Q. Do you remember the street number?
A. I do not.
Q. And where did you work for him?
A. I done all different work for him, not any one job, but several places.
Q. Did you pay to him any money for the bonds?
A. The amount owed me, and he gave me that for the work I have done.
Q. How much did he owe you?
A. Somewheres around four thousand or over four thousand.
Q. And you settled your account with him?
A. Gave me a certain amount cash.
Q. How much?
A. Oh, about twelve hundred or fifteen hundred dollars.

Mr. Jones: That is all.
Mr. Sullivan: That is all.

[fol. 31] Joseph Rose, called as a witness in behalf of the Petitioners having been first duly sworn, testified as follows:

Direct examination.

By Mr. Sullivan:

Q. What is your name?
A. Joseph Rose.
Q. Where do you live?
A. 1322 South Kildare.
Q. What is your business?

A. Plumbing contractor.

Q. Do you know, did you purchase bonds of the Granada Hotel corporation?

A. Yes, I did.

Q. I am showing you these two bonds, and I will ask you if those are the two bonds you purchased (handing documents to witness)?

A. Those are the ones.

Q. How much is that?

A. $500.00.

Q. When did you buy it?

A. When did I buy it? In 1931.

Q. From whom?

A. From a fellow on La Salle, Cody.

Q. How much did you pay for it?

A. A little over five hundred dollars, 505 or 506 dollars.

The Court: Is that a bond house?

Mr. Sullivan: The Cody Trust Company underwrite the issue, and sold the bonds, yes.

Q. Did you sign the petition in this case for the purpose of bringing this under Section 77B of the Bankruptcy Act?

A. (Witness nods his head.)

The Court: Don't nod your head, say "yes" or "no."

A. Yes.

Mr. Sullivan:

Q. And you felt that it was for the best interest of the bondholders to have this action brought in this court?

A. Yes.

Q. And you sincerely feel that this property might be reorganized for the benefit of the bondholders?

A. Yes.

Mr. Sullivan: That is all.

The Court: Any examination of this witness?

[fol. 32] Mr. Jones: No, your Honor.

The Court:

Q. Have you ever seen the hotel?

A. No, I did not.

The Court:

Q. You did not discuss with counsel the question of the District this proceeding should be filled in?

A. Well, I did, you know, I didn't want it to go over; I wanted it to be brought in the federal court.

Mr. Sullivan:

Q. The question is whether to bring the case here or down at Danville. You did discuss in our office the question of whether they owned property here and in Kansas City?

A. I did discuss that.

Mr. Sullivan: That is all.

SAM HARRIS, called as a witness in behalf of the Petitioners, having been first duly sworn, testified as follows:

Direst examination.

By Mr. Sullivan:

Q. What is your name?

A. Sam Harris.

Q. Where do you live?

A. 3235 Lexington Street.

Q. What is your business?

A. Painting.

Q. Painting contractor?

A. Yes.

Q. Did you purchase a bond of the Granada Hotel Corporation?

A. Yes, sir.

Q. I am showing you Bond No. D379 (handing document to witness).

A. Yes, sir, that is it.

Q. Is that the bond you purchased?

A. Yes, sir.

Q. How much did you pay for it?

A. $500.00, and afterwards I bought it they said there was interest on it, I think $3.50 or $4.50.

Q. Slightly over $500?

A. Yes, I paid.

Q. And you have been the owner and holder of it ever since?

A. Yes.

[fol. 33] Q. And you know it is in default, has not paid a cent of interest or principal?

A. Sure, I was there for interest, and I couldn't get it.

Q. You went for your interest, and couldn't get it?

A. Yes.

Q. Did you sign this petition?

A. Yes, sir.

Q. For the purpose of having it reorganized in the federal court under Section 77B?

A. Yes.

Q. Do you honestly feel it is for the best interest of the creditors to do so?

A. Yes.

Q. Do you sincerely believe it can be reorganized for the benefit of creditors?

A. I do.

Q. You talked to me in our office, didn't you, before you signed it?

A. Yes, sir.

Q. Did you ever have any talk about whether they owned other property, other than this hotel?

A. I didn't remember that, I asked that I would like to get my money—you remember that.

Q. Well, but was there any talk about where to file it?

A. No, I don't remember that.

Q. You don't remember that.

A. No, I don't remember that.

Mr. Sullivan: That is all.

The Court: That is all.

Mr. Sullivan: Now, Mr. McAllister appears as attorney of record.

The Court: Who framed this petition, and filed it?

Mr. Sullivan: Mr. McAllister.

The Court: Let me ask Mr. McAllister several questions.

[fol. 34] FRANK E. MCALLISTER, called as a witness in behalf of the Petitioners, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Sullivan:

The Court:

Q. Tell the Court all you know about the institution of this proceeding, Mr. McAllister, how they came to be instituted, why they were instituted. You were connected as counsel for the petitioning creditors?

A. I was counsel for the petitioning creditors. I am connected with the law firm of Schaeffer & Sullivan, No. 1 North La Salle Street. These gentlemen came into the office, and wished to institute a proceeding under 77B.

The Court:

Q. You mentioned "these gentlemen," what do you mean by these gentlemen?

A. Mr. Harris——

The Court:

Q. These petitioning creditors?

A. Mr. Rose and Mr. Gordon, the three petitioning creditors in this case. They had a report on the proceedings from an appraiser, which I went over. I found that the property was located not only in Chicago, but in other states, in Kansas City, some in Michigan and Indiana, and it occurred to me that probably we could get quicker action on it by starting it in Danville, where it would be more central to all property of the debtor, rather than have it congested up here in Chicago. And for that purpose I drafted the petition and filed it in Danville about a month ago, I believe.

The Court:

Q. Have you a copy of that appraisement that you spoke of?

A. I have, your Honor, but it is up in the office, and it is a very voluminous report gotten up by a real estate expert, and it is quite a little bit—not in reference to the entire

history, but the ramifications of this company, and the promoters.

The Court:

Q. Do you remember what the appraisement of this particular property was?

A. Well, no, I am not sure, your Honor, I just remember they had a great deal of property scattered about in several states.

The Court:

Q. This bond issue that is secured by this trust deed now being foreclosed in the state court, that covers solely this Chicago property?

A. That covers solely this Chicago property.

[fol. 35] The Court:

Q. Do you remember the amount of the issue?

A. No, I don't recall it offhand, your Honor, but I recall also that this company had done a great deal of transferring back and forth with reference to these various properties, which consist of some flat buildings in Kansas City and various farms in Indiana and Michigan which are named by the various names of the owners. They traded back and forth a great deal, from the report, as I gathered it, and the thing is somewhat obscure and hazy in spots. It indicates there was a great deal of trading going back in this corporation, and it all relates back to the Granada Hotel Corporation.

Mr. Schaeffer: $525,000.00 is the issue. I will offer one of those bonds.

The Court: I suppose it will come out.

Mr. Schaeffer: I will offer it if the counsel wants me to.

Mr. Jones: I don't want you to do anything.

The Court:

Q. Do you recall any of the details of the property?

A. The Hotel here was the Arlington Hotel, as I recall it, quite a large hotel in Chicago.

The Court:

Q. That is over on the north side?
A. Yes, your Honor.

The Court:

Q. Is it part of the Arlington Club?
A. I don't think so. There is a great deal of transfer of property here.

The Court:

Q. Can you send for this appraisement and have it brought over?
A. Yes, sir.

Mr. Schaeffer: Surely.
The Court: I would like to see it, if you will send for it.

Q. After you talked with those clients and found out, did you check up on this state court procedure, or was that covered in this document?
A. Yes, I checked up on the state court procedure, and it was my opinion at the time it was still pending.

The Court:

Q. What did you find over there? Haven't you got a memorandum of it?
A. No, I just saw there was a proceeding pending there, and the receiver had been appointed, and the thing still seemed to be alive, and so I alleged it in the petition, and brought the action.

The Court:

Q. Was there any interest paid on any of these bonds?
[fol. 36] A. We have here in the file a copy of the bill here, William A. Thuma, complainant, vs. the Granada Hotel Corporation, Case No. 519151, an order of Judge Gentzel, dated in January 1934, entered January 12th, 1934 by Judge Robert E. Gentzel, which ordered that the Chicago Title & Trust Company, heretofore appointed receiver, is authorized to disregard the provisions contained in the order appointing it such receiver, whereby it was excused from actually operating the premises in said order described; and

it is further ordered that said receiver now be, and it is hereby authorized and directed to take possession of said premises, manage and operate the same, and collect the rents, income and profits until the further order of the court.

The Court:

Q. Do you know, or do you recall at this time, Mr. McAllister, whether or not any interest was ever paid on this bond issue?

A. I couldn't find that it has been, within the last two or three years anyway. A complete default, as I check it. I have also another order entered April 24, 1934 in the same proceeding, whereby the account of the receiver was confirmed, and ordered filed, and whereby the receiver had the sum of $3,000.00 cash in its possession—no, is allowed $3,000.00 for receiver's fees. James J. Gaughan, solicitor, was allowed $300.00 in payment for legal services, and the Central Republic Trust Company, as trustee, was directed to be paid by the receiver out of the cash in its possession $2500.00, under a trust deed; also the receiver was ordered to pay insurance. $2500.00 to the Central Republic Trust Company, reducing the amount due on receiver's certificates. The receiver was also ordered and directed to sell the securities in its account, and to pay the proceeds to the Indemnity Insurance Company of North America, whereupon, it says, it would be released and discharged as receiver from any liability on account of the receiver's certificates in the case.

The Court: Well, those orders speak for themselves, of course.

Mr. Schaeffer:

Q. You have an order of appointment of the Chicago Title & Trust Company?

A. I have another order January 12, 1934, of Judge Gentzel in the same proceeding where the Chicago Title & Trust Company was appointed the receiver.

The Court:

Q. Who represents this debtor? Has it any attorneys in Chicago, do you know?

[fol. 37] A. Whether they are here?

The Court:

Q. Whether they have any local representative in Chicago?

Mr. Schaeffer: Yes, your Honor, on the notice, admitted by the vice-president of the company, Mr. Nichols, Fred Nichols. We served him, and he signed.

The Court: They have made no appearance?

Mr. Jones: For your Honor's information, the corporation was dissolved in 1930.

The Court: Did they pay a franchise tax?

Mr. Jones: No.

Mr. Schaeffer: He is still signing as vice-president.

The Court: Well, they are still in existence for the purpose of paying the debts. What I would like to get and have made a part of your record is the document which you had in your possession at the time, in the way of an appraisement.

Mr. Schaeffer: We are perfectly willing to supply it, but we don't want to make it part of the record, because these documents that we have clearly demonstrate fraud in the use of these moneys obtained from the sale of these bonds, not only in the building of this building, but to the enhancement of the directors and promoters and these officers in the building of other buildings; and these records disclose that. And we don't want to disclose all that until we have the opportunity to act. The officers of the Cody Trust Company, to give an illustration, we will show that they held out money taken from these bonds for the purpose of paying taxes. We will show that that was not paid, and this Cody Trust Company subsequently allowed them to be sold, the property to be sold, and bought the certificates of sale. And we will show also that the money was diverted from this corporation into at least two or three other hotels, part of the money used in the operation, in the construction and operation of other hotels, and that a fraud was perpetrated upon the bondholders of this corporation.

The Court: I don't want to interfere with any of your plans.

Mr. Schaeffer: We are willing to present it to the Court for the Court's information.

The Court: Is there anything in your appraisement what you don't want to make public to advise these parties what you are planning?

The Witness: Much of the information I have is of a very confidential nature. It came to us from sources which I [fol. 38] would not want to disclose. We would trace the ramifications of what I allege here is a conspiracy to defraud.

The Court: You contemplate such a thing in the future?

Mr. Sullivan: It is in the petition, your Honor.

The Court: All right, any cross-examination?

Cross-examination.

By Mr. Jones:

Q. In your examination of the records of the foreclosure case in the state court did you find that there was an order entered in that foreclosure case on April 24th, 1934, discharging the receiver, Chicago Title & Trust Company, that you said you had found had been theretofore appointed receiver?

A. I found an order pursuant to a stipulation, that is, an agreed order, which I figured was rather in fraud of my clients' rights there.

Q. I didn't ask you that. What I asked you was not your opinion, but did you find that there was order entered on that day discharging the receiver and approving his final report and account?

A. I found the order, which I read to your Honor.

The Court: The order, the end of the order, excusing the Chicago Title & Trust Company from exercising its duties as receiver, and later discharging it and putting it in possession as trustee.

Mr. Jones: That was part of it, but it speaks for itself.

The Court: You have a copy of it?

Mr. Jones: Yes, your Honor.

The Witness: I also found an order entered March 16th, where the Central Republic Trust Company came in before Judge Harry Lewis, as trustee under this document 1061996 for the surrender to and as such trustee by the receiver possession of all this real estate.

The Court:

Q. What did the Central Republic Trust Company have to do?

A. They were the trustee.

The Court:

Q. Under the trust deed originally?

Mr. Schaeffer: Oh, no, originally was Cody Trust Company.

A. Originally was the Cody Trust Company, but the cross complainant was the Central Republic Trust Company, your Honor. Upon stipulation of the parties hereto this order of March 16, 1934, which stipulation is filed in open court: It is ordered that the Chicago Title & Trust [fol. 39] Company, receiver, forthwith surrender to the Central Republic Trust Company its property in Chicago, Lots 32 and 33——

The Court:

Q. Is the Central the trustee in the state court?

Mr. Jones: Yes, your Honor, the trustee of the first mortgage issue.

Mr. Schaeffer: The Central was not trustee in the first issue, but the Chicago Trust Company.

Mr. Jones: The Chicago Trust Company eventually turned into the Central.

Mr. Schaeffer: And the Central is now in liquidation itself.

Mr. Jones: The City National Bank & Trust Company has been substituted trustee in the first mortgage foreclosure.

The Court:

Q. When?

Mr. Jones: January 3rd, 1935.

Mr. Schaeffer: Subsequent to the filing of the petition.

The Witness: I might mention that counsel who are here represented the Central Republic Trust Company.

Mr. Jones: Sure, we represented the complainant in that case in the state court.

The Court: Any further examination?

Mr. Jones: No.

The Court: Are you gentlemen intending in this matter to proceed and offer a plan of reorganization?

Mr. Schaeffer: We are, your Honor, we are working on a plan. The reason we are not in a position to offer it today—although we have a tentative plan—is that we intend to immediately move for a hearing to determine what our interests are in these other properties that we contend part of our money went to construct. And until we know that we would not be in a position to determine what our assets were.

The Court: All right, now do you want to offer some evidence on the question of jurisdiction?

Mr. Jones: Yes, the certified copy of the order discharging the receiver.

The Court: It may be received in evidence.

Mr. Schaeffer: No objection.

(The said document so offered and received was marked 1, and is in words and figures as follows, to-wit:)

[fol. 40] EXHIBIT 1

Placita—Superior Court of Cook County (Order)

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook, ss:

Pleas, before the Honorable Harry A. Lewis, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County, and State, on the first Monday being the Second day of April, in the year of our Lord, one thousand nine hundred and thirty-four, and of the Independence of the United States of America, the one hundred and fifty-eighth.

Present: The Honorable Harry A. Lewis, Judge of the Superior Court of Cook County.

Thomas J. Courtney, State's Attorney.

William D. Meyering, Sheriff of Cook County.

Attest: Frank V. Zintak, Clerk.

Be it remembered, that heretofore, to wit: on the 24th day of April in the year of our Lord one thousand nine hundred and thirty-four the same being one of the days of the April Term of the Superior Court of Cook County, the following among other proceedings were had in said Court and entered of record, to-wit:

[fol. 41] STATE OF ILLINOIS,
County of Cook, ss:

IN THE SUPERIOR COURT OF COOK COUNTY

No. 519151

WILLIAM A. THUMM

vs.

GRANADA HOTEL CORPORATION, et al.

Order

This cause coming on this day to be heard upon the final account and final report of Chicago Title & Trust Company, Receiver herein, and upon due notice to all parties of record and the Court having examined said account and having read and considered said report and being now fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed

1. That the said account, together with the said report be and each of them hereby is in all respects approved and confirmed and ordered filed.

2. That the said receiver be and it hereby is allowed out of the cash now in its possession as shown in its said final account the sum of Three Thousand Dollars ($3,000.00) in payment of its services as Receiver herein from the date of its appointment to and including the date hereof, and the said Receiver is directed to make payment of said sum out of the cash in its possession as shown in its said account.

3. That said Receiver be and it hereby is ordered and directed to pay to James J. Gaughan, its solicitor, out of the cash in its possession as shown in its said account the sum of Three Hundred Dollars ($300.00) in payment

for the legal services rendered for and on behalf of said Receiver from the date of its appointment to and including the date hereof.

4. That the said Receiver be and it hereby is ordered and directed to pay to Central Republic Trust Company, as Trustee, under the trust deed recorded in the office of the Recorder of Cook County, Illinois as Document numbered 10161996, out of the cash now in its possession as shown in its said account the sum of Twenty-Five Hundred Dollars ($2500.00).

5. That the said Receiver be and it hereby is ordered and directed to pay to Indemnity Insurance Company of [fol. 42] North America, the holder of the Receiver's Certificate of Indebtedness issued pursuant to order of this Court entered on August 11, 1933, the balance of cash that shall remain in its possession after the payment of its own fees, the fees of its solicitor and the sum of $2500 to the said Central Republic Trust Company, as Trustee, under the Trust Deed aforesaid, in reduction of the amount due upon the said Receiver's Certificate of Indebtedness, and in connection therewith it is ordered that the said cash payment be credited and endorsed upon said Certificate.

6. That the said Receiver be and it hereby is ordered and directed forthwith to sell at the market value thereof each and every of the securities set forth in its said account under the heading of "Investments on Hand" and to pay the proceeds of such sale or sales to Indemnity Insurance Company of North America, the holder of the said Receiver's Certificate of Indebtedness issued pursuant to the said order of this Court, and that the said proceeds resulting from the sale of said securities be credited on the amount due on said Certificate of Indebtedness.

7. That the said Receiver be and it hereby is released and discharged as such Receiver of and from any and all liability on account of the said Receiver's Certificate of Indebtedness aforesaid, issued as aforesaid under order of this Court entered on August 11, 1933.

8. That all of the acts and doings of said Receiver and as well all of its receipts and disbursements from the date of its appointment to and including the date hereof be and

each of them hereby is in all respects ratified, approved and confirmed.

9. That said Receiver be and it hereby is released and discharged from any and all further duties in this cause.

Enter.

Harry A. Lewis, Judge.

April 24, A. D. 1934.

STATE OF ILLINOIS,
County of Cook, ss:

I, Frank V. Zintak, Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete [fol. 43] copy of a certain Order made and entered of record in said court in a certain cause now pending in said Court on the Chancery side thereof, wherein William A. Thuma is Plaintiff and Granada Hotel Corp. et al. are defendants.

In witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago, this 21st day of January, A. D. 1935.

Frank V. Zintak, Clerk. (Seal.)

COLLOQUY

Mr. Jones: Your Honor, what I am about to say may not technically come up at this time upon this question, but it will on the next.

The Court: Well, let me ask, is there any question now as to the facts of the state procedure, and the status?

Mr. Jones: Yes.

The Court: I mean, is there any question as to the facts, is there any dispute as to the facts in regard to that? When was your bill filed?

Mr. Jones: It was filed, first, as a partial foreclosure in 1931. Subsequently, it turned into a complete foreclosure.

The Court: You mean, when you originally filed it there were only coupons in default?

Mr. Jones: That is right, started as a partial foreclosure.

The Court: And then, later, as the principal became due——

Mr. Jones: There was a second mortgage foreclosure.

Mr. O'Brien: A partial foreclosure of the second mortgage and a cross-bill to foreclose the first.

The Court: Who filed the original bill?

Mr. Jones: William A. Thuma.

The Court: Was he the complainant?

Mr. Jones: Yes.

The Court: Is he a trustee, or individual owner?

Mr. O'Brien: Individual owner.

The Court: How much was involved?

Mr. O'Brien: A small amount, $3,000 or $4,000.

The Court: Before the Central came in as trustee under the other mortgage, and it filed its cross-bill on the first mortgage, and that was 1931. Then the Chicago Title & Trust Company was appointed receiver.

Mr. O'Brien: Right.

The Court: And that receivership continued until early in 1934?

[fol. 44] Mr. O'Brien: That is right.

The Court: And early in 1934 the receiver was discharged, and the trustee was put into posesssion by the state court.

Mr. O'Brien: That is right.

Mr. Schaeffer: By stipulation.

Mr. Jones: And is still in possession.

The Court: These facts are not disputed?

Mr. McAllister: Not that I know of.

Mr. Jones: The receiver stepped aside, and the trustee went in.

The Court: The foreclosure is in what condition?

Mr. O'Brien: It is before the Master for proof, and, due to some recent decisions, the plan is for the trustee in that foreclosure to bid in on behalf of all bondholders, the first mortgage bondholders.

The Court: Has there been evidence taken before the Master?

Mr. O'Brien: None as yet, because the pleadings are just settled.

The Court: Who is the Master?

Mr. O'Brien: Robert C. O'Connell. There was a second mortgage of $360,000.00.

The Court: That was not foreclosed?

Mr. O'Brien: They have been barred in this action.

The Court: It was not foreclosed?

Mr. O'Brien: No.

The Court: How much is that first mortgage?

Mr. O'Brien: $525,000.00 original issue; I understand $25,000.00 was subordinated.

The Court: Where is this hotel?

Mr. O'Brien: 525 Arlington Place, on the north side, just a little bit west of Clark Street.

The Court: Near the Surf Hotel?

Mr. O'Brien: Not very far from it.

The Court: And the North Chicago Hospital?

Mr. Schaeffer: Just across the street from the North Chicago Hospital, and three blocks from the Surf Hotel.

The Court: That is west of Lincoln Park. What was the size of the hotel, what size hotel is it?

Mr. McAllister: Nine stories.

Mr. O'Brien: Probably eight or nine stories.

The Court: Do you know how many rooms?

Mr. McAllister: A total of 215 rooms.

[fol. 45] The Court: Is that about right?

Mr. O'Brien: I would say it is twice that.

Mr. Schaeffer: It depends on what they call it. One or two-room flats. It occupies about 150 by 150 105 feet.

The Court: Do you recall the appraised value of this property at the time you filed your petition?

Mr. McAllister: No, I don't recall, but it was not the amount of the bond issue.

The Court: Do any of you gentlemen?

Mr. Jones: We haven't seen any appraisement.

Mr. Schaeffer: $375,000.00.

Mr. McAllister: It is not the amount of the bond issue; considerably less.

Mr. Jones: Some people think none of the present day values equal the bond issues.

The Court: None of them?

Mr. Jones: Generally speaking.

The Court: There ought to be some exceptions.

Mr. Jones: Sure.

Mr. McAllister: My idea is that this thing had been pending so many years in the state courts.

Mr. Jones: Well, we must all remember that during that period there were many things that interfered: the banks closed up, the Security Act situation—you couldn't finance

a thing—a number of problems then that are now out of the way.

What I was about to say to your Honor, while technically, it does not come up possibly on this question of whether or not this petition was filed in good faith, yet it would come up when the next branch of this motion came along, where you are asking to enjoin the foreclosure in the state court, and the appointment of a trustee to take possession of that property. Therefore, I think, in duty bound, I should mention it right at this time, your Honor, as you are considering the question of filing it in good faith, and that is this:

I am asking leave on behalf of the City National Bank & Trust Company of Chicago, as successor trustee under the first mortgage issue, to file a special and limited appearance here to direct the attention of the Court to the fact that summary proceedings may not be had here—the debtor corporation involved here has not owned or has not had title to the mortgaged hotel company——

[fol. 46] The Court: Yes, I have had that question here time and again.

Mr. Jones: Since the year 1930.

The Court: Let us see whether there is any dispute about that. There was a decree of the state court forfeiting the charter for non-payment of taxes?

Mr. Jones: Not at all, that is not the question.

The Court: What was it?

Mr. Jones: By deed. In 1930 the debtor conveyed to another corporation, and that corporation is not before this court. And I have prepared an intervening petition under this special and limited appearance which sets forth the facts in that regard, and states them more accurately than I could possibly.

The Court: We haven't reached that stage just yet. There is nothing else upon this question of good faith?

Mr. Jones: I have nothing to offer.

The Court: Apparently they filed it in good faith, and I shall so find.

The objection to the jurisdiction of the court, to which I have listened, for the reasons I have previously stated, I don't believe is a good objection. I think the purpose and intent of Congress was to take jurisdiction in all cases where foreclosure proceedings were pending and where

bond issues were in defualt, where petitioners desired, in good faith, that the federal court should take jurisdiction. Of course the Act says, equity receivership. Receivership is a fiduciary relationship, the receiver holds the property for the benefit of the parties to whom the court may eventually deliver the property, or to whom the proceeds of liquidation will come, in accordance with their respective interests, if liquidation shall be decreed.

Now it appears here that this trustee's duty with regard to the disposition of that property is in no wise different from the duty of the receiver. It may not distribute the proceeds of the property, or the property itself to any person or persons than those designated by the court as beneficiaries. So the difference between the trusteeship and the receivership in possession is nil, and the mere name of "receiver" or of "trustee" is in the opinion of this court a wholly immaterial one, one without real difference. Consequently, I think the Act is directly applicable to these situations, and the petition will be approved.

[fol. 47] Now, what is your next step?

Mr. Schaeffer: Your Honor, for the appointment of a temporary trustee.

Mr. Jones: Upon that point, if there is nothing to appoint a trustee for——

The Court: I might appoint a temporary trustee to investigate the condition and report to the court.

Mr. Schaeffer: All right.

The Court: Whom have you in mind, gentlemen?

Mr. McAllister: We might suggest the court appoint whoever the court has in mind. I know Mr. Goldstein, who is in charge of the real estate department of the Board of Education, who has been for a number of years, a man of unimpeachable integrity.

The Court: Is it mandatory upon me to appoint somebody from the District in which this was filed, or is it not?

Mr. McAllister: I think—my own impression is that you are, because that is one of the things that was before Congress when the Irving Trust Company was making a very——

The Court: I have appointed Mr. Meyers as a trustee for the Algonquin. I don't know whether he will ever have a job in this case or not, but it seems to me it might be advisable to appoint him as temporary trustee, not to take

possession, but to investigate and report formally to the court as to what he finds the condition to be with regard to the present operation of the property: the title, occupancy, tenants, the rentals, and what is going on. And the court may find that the trustee should remain in possession pending the final disposition of this case. And I bespeak therefor from the trustee co-operation so that he may have the full understanding and help here when he reports, so that I can determine whether, pending this litigation I shall permit this trustee to remain there or not.

Mr. Jones: We will see that he gets the facts as to title and its operation.

The Court: Will some of you gentlemen take it up with Mr. Meyers and have him take it up?

Mr. McAllister: It is very satisfactory, he is satisfactory so far as the petitioning creditors are concerned.

The Court: You may draft an order in accordance with that suggestion.

Mr. McAllister: I have an order, I have left the name of the trustee blank.

[fol. 48] Mr. Schaeffer: If he wants to appoint him temporarily, that order would not be applicable.

Judge, we will draw an order and submit it to Mr. Jones.

Mr. Jones: Very well.

The Court: What is ~~you~~ next motion?

Mr. McAllister: A date upon which the appointment of the trustee may be made permanent.

The Court: That must be within thirty days.

Mr. McAllister: Within thirty days, that is right.

The Court: This is the 22nd—February 19th.

Mr. McAllister: And notice to creditors.

The Court: They must be notified then.

Mr. McAllister: Two days for mailing.

Mr. Schaeffer: The order should provide that the present trustee should file the list of creditors, bondholders, so as to make it possible for us to give such notice to them as is necessary.

The Court: I guess, under the decisions, you had better do that.

Mr. Jones: The Statute is that the trustee that your Honor appoints shall file a report. The other matter comes up upon exceptions, if, as and when the trustee reports he could not get them. But there is no foundation here at this time.

The Court: Will you give the list to Mr. Meyers?

Mr. Jones: May I defer my answer to that——

The Court: Because if you don't I will issue a subpœna now.

Mr. Jones: May I defer the answer for a moment? I will answer you before we leave here.

There was another motion called, your Honor? The motion read, to enjoin future prosecution of the foreclosure case in the state court, and, speaking *to* that, I want to take leave from the Court under a special and limited appearance, which I have handed up to your Honor, to file the petition of the City National Bank & Trust Company, the successor trustee under the trust deed which is involved in the foreclosure case in the state court.

And in that petition the showing is made, under oath, that the debtor corporation for whom your Honor has appointed a temporary trustee, is not the owner of and has no title or interest in either the real estate or the personal property that is situated in that hotel. And the petition goes on to show, passing the formal parts on the first page, para-
[fol. 49] graph 4, that by warranty deed dated April 29th, 1929, Granda Hotel Corporation conveyed the above described real estate to Granda Apartments, Inc., an Illinois corporation, which latter corporation has owned the premises ever since. Your petitioner as such trustee is likewise in possession of the personal property and equipment (reading from said petition).

The Granda Hotel Corporation never had anything to do with the furnishings in that hotel.

Under those circumstances it seems clear to me that the motion to enjoin the prosecution of the foreclosure case in which the debtor corporation has no interest should be denied. There is, surely, here, if your Honor please, at least a controversy which can be determined only by a plenary action by a trustee under the decisions of the Supreme Court of the United States, not by a summary proceeding without consent.

The Court: Is there any disputed issue in the state court as to the title?

Mr. Jones: No, your Honor.

The Court: Is there anybody making a claim?

Mr. Jones: No, because the trustee has the chattel mortgage. Albert Pick & Co. finally took out all of their equip-

ment, and then, later on, the receiver and the trustee, if the facts as related to me, if my memory is correct, I was not in that part of the case, refurnished the hotel out of earnings.

Mr. Schaeffer: Who owns them then?

Mr. Jones: The trustee under the first mortgage bond issue. But the Granda Hotel Corporation deeded everything it had in 1929, parted with everything, the deed is on record. There was a refinancing problem on there. Now no trustee appointed of any bankruptcy estate has a right to take possession, under the decisions, of property adversely held, in a summary proceeding. That being so—

The Court: Did you read the last decision the Supreme Court handed down last week?

Mr. Jones: On a consent proceeding?

The Court: No, on what is a colorable proceeding.

Mr. Jones: Did they change from the prior rulings?

The Court: No, but the language of this opinion I want to call to your attention.

(At this point the Court left the Bench and brought a book or pamphlet from his chambers, from which he read to counsel.)

[fol. 50] Mr. Jones: They held right in line with the prior holdings of the Supreme Court. I think we have a different situation here.

The Court: You have a different situation here to this extent: there is, as in many of these building corporations in this city, apparently a conveyance from one corporation to another. I find that in many instances. The building corporations must have some reason for such action. Consequently, there is no present title in the debtor, in this corporation.

Mr. Jones: Agreed.

The Court: And I have to say again, what did Congress mean when it passed this Reorganization Statute, and gave to the Court of Bankruptcy jurisdiction of a reorganization proceeding, a property which is encumbered. I have thought a good deal about it, because that question has been up before, and some counsel in this case have some other proceedings where they are making a claim of third parties. I recall particularly the 1030 North Dearborn Bldg. com-

pany. There, there was a conveyance of the hotel. But here we have a statute, which, I think is intended to confer jurisdiction over the res of the property, and to permit creditors to effect a reorganization.

It seems to me what the court is dealing with is the property and the claims against it. The bondholders, who have their interest in this property, desire to work out a reorganization under the supervision of the court, where a majority of the bondholders can force a reorganization, as compared with the state court proceedings, where a majority can not control, and where if there are non-assenting bondholders they must be taken care of by court order fixing a just compensation for their interest in the property.

Now, consequently—I may be all wrong again—but I am trying to interpret this Act as I think it was intended to be interpreted by Congress, and I think what this court should devote its attention to, over which he takes jurisdiction, is the res against which bondholders have liens.

Mr. Jones: Suppose there is a bond issue by A in 1925, and in 1926 A sells that property upon which that bond issue is placed, to B. And then suppose, in 1935 A——

The Court: You mean for a valuable consideration?

Mr. Jones: Yes, your Honor.

Then A is put into reorganization under 77B. To my mind, most respectfully, I submit to your Honor that the Bankruptcy Court having jurisdiction of A there, would [fol. 51] have no right, in a summary proceeding as distinguished from a plenary action (citing Harrison v. Chamberlin, 272 U. S.) would have no right to take that action.

That situation is this——

The Court: The trouble with that is this: You lose sight entirely of the logic of this situation, and that is, that this is a petition in rem by bondholders for the reorganization of a piece of property in which they have an interest, without regard to where the title is. Because Congress has done something it never had done before. It is attempting to do something that is far beyond what we concede ordinary court proceedings are.

Mr. Jones: True.

The Court: Just as the original Bankruptcy Act came along and was so far flung from what had been done before. We had always believed that a judgment could not be set

aside, but the first thing that Congress did under the first Bankruptcy Act, where a judgment was obtained in a court with jurisdiction of the parties and subject matter and the party was insolvent, was to say the judgment was absolutely void. Now Congress has said, if there is a piece of property encumbered by a trust deed, and the bondholders own that property, those bondholders have the right to appeal to the United States Court—in an action, which is, so far as its essence is concerned, an action in rem and have that Court take jurisdiction and bring about a reorganization.

Mr. Jones: Of the property that belongs to the debtor. Ah, but if it don't belong to the debtor, then what?

The Court: That just is where you and I don't agree.

Mr. Jones: That is right, your Honor.

The Court: Because, as I say, I don't care who this debtor is, I don't care where he may live, I don't care what his interest may be. He has sold to the public units in that property; he may have conveyed it two or three times; it may have been conveyed two or three times, but the fact remains that those things, sold to the public, are in default, and that they own the property subject only to the equity of redemption.

And that is the thing that the court seizes hold of it this jurisdiction upon petition of bondholders. It takes the bondholders' property, and reorganizes the bondholders' property.

Mr. McAllister: And the Court can look behind the legal [fol. 52] fictions, and I think we will see quite a few legal fictions in this case.

Mr. Jones: That is a separate subject.

The Court: Now, if and when this subsequent grantee appears before this court and discloses such an interest as needs the protection of this court, this court will have a right to, and it would take cognizance of that and enter such orders as are in accordance with the facts and equity.

Mr. McAllister: That is correct.

The Court: But even that does not deprive these holders of the right to invoke under this mandate the jurisdiction of the federal court under the Constitution to take jurisdiction of encumbered property, reorganize it, and distribute it or dispose of it as the equity may demand. If we hold otherwise, we are defeating the purpose of the legislation.

Mr. Jones: I think not, for this reason, if the Court please—

The Court: Yes, if every time some fly-by-night grantee can come in and say it owns a property covered by a prior bond issue. Your client has no interest in this case except as a trustee.

Mr. Jones: I quite agree with that, of course.

The Court: Then why should it be so insistent upon an interpretation that would deprive the court of a jurisdiction which Congress intended should be worked out.

Mr. Jones: They have only the interest of the bondholders in mind. There are many other reasons that enter into this.

The Court: I am always told that.

Mr. Jones: But beyond that. If the debtor is the owner of the property, I agree this Court in a proceeding for the relief of the debtor can go ahead and reorganize.

The Court: This is more than a debtor's proceeding; this is a creditors' proceeding also. The statute expressly provides that the court may take jurisdiction of the property upon petition of the creditors who are interested in the property.

Mr. Jones: If, on the other hand, a showing is made to the court, that the debtor does not have title to the property that is sought to be reorganized, and it is made apparent to the court that that is not merely a colorable situation, but there is a substantial situation there, the Court, in my opinion, can only do what it could always do in the conventional bankruptcy, that is, to direct the trustee to take the proper steps—

[fol. 53] The Court: If they were a bona fide purchaser; that contention made by you is correct. But a trustee for bondholders has no standing in court to defeat jurisdiction.

Mr. Jones: He has a right to foreclose in the state court where he can protect the bondholders' title where in its opinion and in the opinion of its counsel you can not give good title through this proceeding.

The Court: Exactly.

Mr. Jones: Your Honor asked me a question, why we are insistent. Because in the opinion of the trustee and its counsel the only way these bondholders can get title to what is theirs, and theirs alone, is by the foreclosure in the state court, and that no matter what orders this court en-

ters here, it can not do that. We believe that otherwise——

The Court: Well, you may have your record on this matter.

Mr. Jones: Very well, that is what I wanted to make clear.

The Court: I will issue a temporary order against the prosecution of the foreclosure suit, without prejudice to the parties to have further hearings upon the matter if it is deemed essential. The time for the report of the trustee is made. These are all interlocutory orders.

Mr. Jones: May I have leave, your Honor, to file the special and limited appearance and petition of the City National Bank and Trust Company of Chicago as trustee?

The Court: You may file that special and limited appearance. In my opinion it is not sufficient to put you in a place in this court where you can raise this question. If you come into court and object to and answer the petition, your appearance, even though you call it limited, becomes one upon the merits.

Mr. Jones: And my objection to the entry of the temporary restraining order is noted? May I present——

The Court: The order will be that there is a temporary restraining order, subject to the further order of the court, without prejudice, hereafter to the parties in interest to move to dissolve it, or to raise the question in such manner as is proper practice.

Mr. Jones: I wish to appeal from that order.

The Court: You will have to file your petition and assignment of errors.

Mr. Jones: I was going to inquire in that connection how long your Honor would be in the City because I am——

The Court: Until tomorrow noon.

[fol. 54] Mr. Jones: Very well. Will your Honor indicate the amount of bond?

The Court: It should not be very much, say bond in the amount of $250.00.

Which was all the evidence offered or proceedings had on the hearing of the above entitled cause.

Certificate of Judge

And forasmuch as the matters and things above set forth do not otherwise fully appear of record in this cause the

respondent tenders this Transcript of Proceedings, and prays that the same may be certified under the hand and seal of the Judge of this Court, and thereby made a part of the record in such cause, which is accordingly done this 28th day of February, A. D. 1935.

Walter C. Lindley, Judge of the District Court of the United States, Eastern District of Illinois. (Seal.)

I approve the above Transcript of Proceedings.

Frank E. McAllister and Morris Schaeffer, Attorney for Petitioners.

IN UNITED STATES DISTRICT COURT

(Caption—2613D.)

MEMORANDUM—Filed Feb. 26, 1935

Parties holding bonds of the Granada Hotel Corporation, secured by trust deed, filed herein on December 31, 1934 their creditors' petition under Section 77-B of the Bankruptcy Act, seeking reorganization of the property, which consists of an apartment building, of some 200 apartments. The defendant corporation made no response to service of subpœna and has been defaulted. Evidence has been submitted upon the question of good faith, from which it appears that the petitioners are bona fide bondholders, who received their securities largely in consideration of services rendered in the construction of the building.

[fol. 55] The City National Bank and Trust Company, as trustee, on January 22, 1935 filed its special and limited appearance, urging that the Court has no jurisdiction, for the reason, as it alleges, that the Granada Hotel Company sometime ago conveyed its property to the Granada Apartment Company. The trustee filed also its intervening petition, asserting the same facts and, further, that in a foreclosure suit pending in the state court, a receiver, originally appointed to hold possession of the promises pending foreclosure, had been discharged and that an order had been entered in that court putting the trustee in possession. The trustee contends, therefore, that it is an adverse holder, and that the Court has no jurisdiction over it or the property

in its possession. A bondholders' committee appeared for the purpose of attacking the jurisdiction of the court, asserting that the state court proceedings does not constitute an equity receivership within the meaning of Section 77-B.

As the Court has previously pointed out, the intent of Congress apparently was to give the holders of bonds in default an opportunity to have property securing their bonds reorganized in the federal court in lieu of liquidation under foreclosure in either the state or federal court. Acting in pursuance of that right, the creditors, after patience with long extended foreclosure proceedings, not yet blossoming into decree, have filed their petition in proper form and submitted their evidence. The Court finds that the petition was filed in good faith and should be approved.

The Court is not impressed with the contention that the facts related do not constitute an equity receivership, essential to jurisdiction of this court. As is frequently observed, a receiver is a fiduciary of the Court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. The trustee here, likewise, is a fiduciary of the state court and is acting under the orders, directions and control of that court. Words of themselves are unimportant; whether the trustee be called a receiver, a guardian, a custodian or by some other name, it remains, in its essence, a fiduciary in possession of property pending the outcome of foreclosure, holding under the Court's order, incidentally to the ultimate purpose of the state proceedings. Consequently there is an equity receivership within the meaning of that term as used by Congress.

Upon the question of whether the trustee is an adverse holder the Court at this time expresses no opinion. The effect of any conveyance from one corporation to another [fol. 56] of similar name is not now before the Court. Whether the facts are such that there is a holding of title adverse to the trustee is a question which must be determined from evidence submitted after full hearing. It is well recognized that this court has jurisdiction to examine the character of alleged adverse holdings and determine whether claims of adverse title is merely colorable or is asserted in good faith. But this Court is not now examining or determining that question.

The trustee contends that there should be no restraining order against the foreclosure proceedings in the state court.

Those proceedings have been pending for some four or five years and have not yet reached final decree. I am advised by counsel that the ultimate effect of a decree will be to bar certain parties claiming some interest. It seems desirable, therefore, that those proceedings be allowed to proceed to a decree. Such prosecution may result in the saving of time and expense in marshaling and liquidation of claims. However, it is desirable that no sale be had until it can be determined what is to be done under the present proceedings. I take it that counsel will not proceed to a sale without further communicating with the Court. Consequently, I shall at this time issue no restraining order against the prosecution of the foreclosure proceedings to an ultimate decree of foreclosure, but the Court will be open at all times, if necessary, for the purpose of entertaining application for injunction against a sale of the property.

Accordingly the Court finds that there is an equity receivership within the meaning of the statute; that the Court has jurisdiction of the petition; that same was filed in good faith and that a temporary trustee should be appointed, notice given to creditors and hearing had as to the appointment of a permanent trustee. Proper order may be submitted. The Court appoints Fred C. Myers as temporary trustee with directions, however, not to take possession of the property but to investigate and report fully. He should have counsel so that he can determine whether there is reasonable ground for him to invoke the jurisdiction of this court to determine in a summary proceedings whether claim of title is made in good faith or is merely colorable, or whether he should proceed with a plenary suit for such relief as the facts will warrant. Accordingly no bond is necessary at this time.

Entered this 26th day of February, A. D. 1935.

Walter C. Lindley, Judge.

[fol. 57] IN UNITED STATES DISTRICT COURT

(Caption—2613-D)

DECREE—Entered March 2, 1935

This cause coming on to be heard upon the motion of Frank E. McAllister, attorney for the petitioning creditors

in the above entitled cause and due notice having been given all parties in interest, and the Court having heard the arguments of counsel and being fully advised in the premises;

It is Hereby Ordered:

1. That the petition of the petitioning creditors, Sam Harris, J. Rose and I. Gordon, be and the same is hereby approved as being properly filed and filed in good faith.

2. That Fred C. Myers, be and he is hereby temporarily and until further order of this Court, appointed Trustee in this cause to investigate the properties of the debtor and to report formally to the Court as to what he finds the conditions to be with regard to the properties and the present operation thereof.

3. That the said debtor be and it hereby is ordered to give access to the said Fred C. Myers, temporary Trustee, to all of its books, records, papers, contracts, files and other documents for the purpose of further advising this Court.

4. That the City National Bank and Trust Company, Successor Trustee in the Trust Indenture, allow the said Fred C. Myers, temporary Trustee, to examine all documents, books, records, contracts, files and other papers in its possession and under its control relative to the affairs of the above named debtor, so that the Court may be properly advised in the premises.

5. That the Cody Trust Company and its Receiver, be and each of them are hereby ordered to and directed to give access to the said Fred C. Myers, temporary Trustee, to all books, records, documents, contracts, files and other [fol. 58] papers relating to the affairs of the debtor corporation herein, so that the Court may be properly advised in the premises.

6. That the City National Bank and Trust Company, Successor Trustee, and the Debtor Corporation, shall file with the Clerk of the United States District Court forthwith, a complete list of all creditors and stockholders of the debtor corporation, and upon the properties described in the creditors' petition herein.

7. That said Temporary Trustee shall have counsel to assist in the determination of matters of title in this cause

and that Walter Fackler & Walter T. Gunn is hereby appointed as attorney for the temporary Trustee in said matter.

8. That a hearing be, and the same is hereby set for the 30th day of March, 1935, at 10:00 o'clock A. M., at which hearing, or any adjournment thereof, the Court will determine whether or not it shall make permanent the temporary appointment of said Trustee, or shall terminate such appointment, and restore the Debtor to possession, or shall appoint a substitute Trustee or appoint an additional Trustee or Trustees, and the temporary Trustee is hereby directed to cause a notice of said hearing to be published once a week for two successive weeks in a newspaper of general circulation published in Chicago, Illinois, and that said Trustee send by mail a copy of said published notice to all creditors and stockholders of the debtor whose names and addresses are known to said Trustee at least ten (10) days before the date set for said hearing.

Enter.

Walter C. Lindley, Judge.

Dated March 2, 1935.

[fol. 59] IN UNITED STATES DISTRICT COURT

(Caption—2613-D and 59143)

ORDER TRANSFERRING CAUSE—Entered March 9, 1935

For the reasons indicated in the memorandum filed in 2438-D which is incorporated herein by way of reference,

It Is ordered by the Court that this cause be and the same is hereby transferred to the District Court of the United States for the Northern District of Illinois, and that the Clerk transmit to that Court all pleadings, transcripts, orders and other documents herein.

Dated this 9th day of March, A. D. 1935.

Walter C. Lindley, Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

No. 2438-D

In Re FLAMINGO HOTEL

This proceeding has reached the stage where plans have been filed by various parties in interest and consideration of the same is pending. An order has been entered referring the determination of claims to Jacob Grossman, Esq., as master.

It is the belief and hope of the Court, encouraged by the suggestions of the parties, that a feasible plan of reorganization can be arrived at at an early date. The administration under the trustee has proceeded with pronounced economies over the former administration.

I have recently been notified that I have been assigned by the Chief Justice to hold court in California. The extent of my stay there is indefinite but it may be as long as three months.

The property involved in this cause is located in Chicago. Most of the interested parties and their counsel reside there. The only suggestion for transfer pending has been filed by the trustee in the state court foreclosure proceedings. All parties have expressed their willingness that the administration should proceed here in the belief that early [fol. 60] reorganization can be had. However, in my absence, the discharge of all judicial duties in this district will devolve upon Judge Fred L. Wham, whose official residence is at East St. Louis, and who must be in Cairo for the April term and in East St. Louis in May and June. Consequently it will be most inconvenient for parties to present to him for consideration the plans for reorganization and other administrative matters arising herein. Furthermore, in my absence, his duties will be so increased, that his time will be fully occupied, leaving little or no opportunity to give extended consideration to the problems of administration and reorganization presented herein.

Consequently the situation is one where the provisions of 77-B apply and I believe that, acting in my discretion, I should, in the interest of and for the convenience of all parties transfer this proceedings to the Northern District of Illinois.

Accordingly it is ordered by the Court that the cause be and the same is hereby transferred to the Northern District of Illinois; that the Clerk transmit to that court all pleadings, documents, transcripts of orders and other records herein.

Entered this — day of March, A. D. 1935.

—— ——, Judge.

(Endorsed:) 59143. Filed Mar. 14, 1935. At 10:00 O'clock A. M. Henry W. Freeman, Clerk. Filed Mar. 9, 1935. D. H. Reed, Clerk.

[fol. 61] In United States District Court

(Caption—59143)

Notice

To Defrees, Buckingham, Jones & Hoffman, 105 South La-Salle Street (Suite 1720). Frank E. McAllister, 111 West Washington Street (1246):

You Are Hereby Notified that on Thursday, March 21, A. D. 1935, we shall appear before his Honor, Judge Barnes, or in his absence, before whatsoever Judge may be hearing his motions, in his place instead, in the Federal Building, City of Chicago, Illinois, and shall then and there present the petition of John Mack, and shall ask that an order be entered in conformity therewith in accordance with the prayer of said petition, copies of which petition are herewith served upon you, at which time and place you may appear if you so see fit.

Mort D. & Frank Goldberg, Attorneys for John Mack.

Received a copy of the above foregoing notice on — March, A. D. 1935.

Defrees, Buckingham, Jones & Hoffman, Frank E. McAllister.

IN UNITED STATES DISTRICT COURT

(Caption—59143)

PETITION OF JOHN MACK—Filed March 21, 1935

Your petitioner, John Mack, respectfully represents unto the Court that he is the owner of the following described first mortgage bonds on the building sought to be reorganized by proceedings herein to wit:

[fol. 62]

Bond Nos.	Amount
C 236	$100.00
C 262	100.00
C 278	100.00
D 204	500.00

totalling the sum of Eight Hundred Dollars ($800.00).

Your petitioner further represents the foregoing bonds have not been deposited with any bondholders' committee.

Your petitioner further states upon the information and belief that the non-depositing bondholders are not duly represented in the proceedings brought herein and asks leave of Court that the firm of Mort D. & Frank Goldberg represent such class of bondholders.

Your petitioner further asks that an order be entered herein requiring all attorneys and parties to the proceedings to give notice of any and all further proceedings to the firm of Mort D. & Frank Goldberg.

And your petitioner will ever pray.

John Mack, Petitioner, by Mort D. & Frank Goldberg, by Frank Goldberg, His Duly Authorized Agents. Mort D. & Frank Goldberg, Attorneys for Petitioner, 1832—11 South Lasalle Street, Tel.: Central 9590.

Duly sworn to by Frank Goldberg. Jurat omitted in printing.

[fol. 63] IN UNITED STATES DISTRICT COURT

(Caption—59143)

ORDER GRANTING LEAVE TO ENTER APPEARANCES—Entered March 21, 1935

On motion of Mort D. & Frank Goldberg

It Is Ordered that leave be and the same is hereby given them to enter their appearance as solicitors for Non-deposited Bondholders and

It Is Further Ordered that notice of all motions and proceedings be served on Mort D. & Frank Goldberg.

IN UNITED STATES DISTRICT COURT

(Caption—59143)

APPEARANCE—Filed March 25, 1935

We hereby enter the appearance of John Mack, defendant, and ourselves as his attorney in the above-entitled cause.

Mort D. & Frank Goldberg, Defendant's Attorneys,
11 South LaSalle Street (1832), Central 9590.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

(Caption 2613 D and 59143)

PRÆCIPE TRANSCRIPT OF RECORD—Filed April 4, 1935

To the Clerk of the United States District Court for the Northern District of Illinois:

The Clerk will please prepare a transcript of the record in the above entitled cause for use on the appeal of C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer as members of a Committee constituted under the terms of the deposit agreement dated April 28,

1933 relating to first mortgage bonds of Granada Hotel Corporation, to the United States Circuit Court of Appeals for the Seventh Circuit (as allowed on petition and assignment of errors filed before the United States Circuit Court of Appeals for the Seventh Circuit) from an order entered in the above entitled cause March 2, A. D., 1935, and include in said transcript the following, that is:

1. Original petition herein filed by Sam Harris and others under Section 77B on December 21, 1934.
2. Subpœna issued in the Eastern District of Illinois to Granada Hotel Corporation, filed January 3, 1935.
3. Notice filed January 18, 1935 as given to George U. Nichols, Vice President of Granada Hotel Corporation.
4. Intervening petition of City National Bank and Trust Company of Chicago, as Trustee, filed January 22, 1935.
5. Answer of C. S. Tuttle, et al., to the original petition of Sam Harris, et al., filed January 22, 1935.
6. Petition of City National Bank and Trust Company of Chicago, as Trustee, for leave to intervene filed January 22, 1935.
7. Order of default entered January 22, 1935 against Granada Hotel Corporation.
8. Order entered January 22, 1935 granting leave to C. S. Tuttle, et al., to file instanter their answer to the original petition.
9. Order entered January 22, 1935 for leave to City [fol. 65] National Bank and Trust Company of Chicago to intervene and to file its intervening petition instanter.
10. Special and limited appearance of City National Bank and Trust Company of Chicago filed January 22, 1935.
11. Special and limited appearance of C. S. Tuttle, et al., filed January 22, 1935.
12. Memorandum opinion of Walter C. Lindley, Judge, filed February 26, 1935.
13. Order entered March 2, 1935 approving petition of Sam Harris, et al., as properly filed, etc.
14. Order entered March 9, 1935 transferring cause to Northern District of Illinois, etc.

Note: All and each of the above were filed in the Northern District of Illinois in Cause 54143, assigned by that District in the above matter as transferred from the Southern Dis-

trict of Illinois, and were so filed on the 14th day of March, 1935.

15. Notice filed herein March 21, 1935.
16. Petition of John Mack filed herein March 21, 1935.
17. Order entered herein March 21, 1935 granting leave to Mort D. and Frank Goldberg to file appearance, etc.
18. March 25, 1935, appearance of said John Mack and Mort D. and Frank Goldberg.
19. Bill of exceptions filed herein April —, 1935.
20. This præcipe for record.

Note: The appeal was prayed before and allowed by the Circuit Court of Appeals for the Seventh Circuit and the petition for appeal, bond and assignment of errors are on file in that court.

Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Attorneys for C. S. Tuttle, et al.

Dated April —, 1935.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] In U. S. Circuit Court of Appeals for the Seventh Circuit

No. (as Transferred) 59143

(Eastern District Number prior to transfer, 2613-D)

In the Matter of Granada Hotel Corporation, Debtor

Notice of Appeal—Filed March 28, 1935

To Mort D. and Frank Goldberg, 1832—11 S. La Salle Street; Frank E. McAllister, 1246—111 W. Washington Street Chicago, Illinois:

Please Take Notice that on the 28th day of March, 1935, at the opening of court in the forenoon, we shall appear before the United States Circuit Court of Appeals for the Seventh Circuit, or before the presiding judge thereof, and

shall present and file the petition for appeal and the assignment of errors of C. S. Tuttle and others, members of a committee acting under deposit agreement dated April 28, 1933 relating to bonds of Granada Hotel Corporation, copies of which petition and assignment of errors are handed you herewith. We shall ask the entry of an order pursuant to the prayer of said petition.

Defrees, Buckingham, Jones and Hoffman, Attorneys for C. S. Tuttle, et al.

Received a copy of the above notice and of the petition [fol. 67] and assignment of errors therein referred to this 27 day of March, 1935.

Mort D. & Frank Goldberg, Frank E. McAllister.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL—Filed March 28, 1935

To the Honorable, the Judges of Said Court:

Now come C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as members of a Committee constituted under the terms of the deposit agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, by Defrees, Buckingham, Jones & Hoffman and Don Kenneth Jones, their attorneys, and respectfully petition the court that they be allowed an appeal from an order entered March 2, 1935 in the District Court of the United States for the Eastern District of Illinois by his Honor, Judge Walter C. Lindley in case then therein pending as No. 2613-D entitled "In the Matter of Granada Hotel Corporation, Debtor," since by order of the District Court for the Eastern District of Illinois transferred to the District Court of the United States for the Northern District of Illinois, Eastern Division, and now

numbered 59143, in and by which said order from which the [fol. 68] appeal is prayed the petition below was decreed to have been properly filed and the jurisdiction of the court upheld, and in and by which other relief was granted, a copy of which order is hereby attached marked Exhibit 1 and by reference made a part hereof.

And your petitioners show unto the court that:

1. The proceeding below was brought under Section 77-B of the Bankruptcy Act by some of the holders of first mortgage bonds of an issue of Five Hundred Twenty-five Thousand Dollars ($525,000) secured by real estate commonly known as Granada Hotel, and secured also by the personalty in the improvement upon said real estate, a copy of which petition is hereto attached marked Exhibit 2 and by reference made a part hereof.

2. That on January 18, 1935 the petitioners presented to the Honorable Walter C. Lindley, then sitting at Chicago, Illinois, their motion for the entry of orders pursuant to the prayer of the said petition, Exhibit 2 hereto, which said motion was entered and continued to January 22, 1935, and that on the 22nd day of January, 1935 your petitioners, by leave of court first had and obtained, filed their answer to the said petition, Exhibit 2 hereto, in and by which answer they showed to the court that there was no receiver for the debtor corporation or for any of its properties, and that the receiver mentioned in the creditor's petition below had been discharged long prior to the filing of the petition under 77-B; that therefore the court was without jurisdiction and that the petition below should not be approved as properly filed but should be dismissed, copy of which answer is hereto attached marked Exhibit 3 and made a part hereof.

3. That after full hearing the motions presented by the petitioners below were taken under advisement, briefs were submitted, and on February 26, 1935 the Honorable Walter C. Lindley filed a written opinion, pursuant to which the order, Exhibit 1 hereto, was entered. The said opinion is attached as Exhibit 4.

Wherefore, and for the reasons specified in their assignment of errors filed herewith, your petitioners pray that an appeal be allowed from the said order entered March 2, 1935; that a citation be granted directed to Sam Harris,

J. Rose, and I. Gordon, petitioning creditors below, commanding them to appear before the United States Circuit Court of Appeals for the Seventh Circuit to do and to receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings, pleadings, papers and evidence upon which said order was [fol. 69] entered, duly authenticated, be transmitted to said Circuit Court of Appeals by the Clerk of the said District.

C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, As members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, by Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Their Attorneys. Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Attorneys for said Petitioners

Duly sworn to by Vincent O'Brien. Jurat omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Mar. 28, 1935

Now come C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as members of a Com- [fol. 70] mittee constituted under the terms of the deposit agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, and file the following assignment of errors on appeal from order of the District Court of the United States for the Eastern District of Illinois dated March 2, 1935 approving the original petition in the above entitled cause as properly filed and as filed in good faith, etc.:

1. That the said Court erred in entering the said order so appealed from in that the sole ground of jurisdiction averred was that a receiver had been named for the debtor or its property, whereas the proof showed that said receiver had been discharged long prior to the filing of the original

petition herein, and that there was no receiver for either the debtor corporation or any or all of its property.

2. That the Court erred in finding and decreeing that the possession of a Trustee under a trust deed in the nature of a mortgage is equivalent to an equity receivership.

Wherefore, they pray that the said order of March 2, 1935 be reversed.

C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, As members of a Committee constituted under the terms of the deposit agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, by Don Kenneth Jones, Defrees, Buckingham, Jones & Hoffman, Their Attorneys.

[File endorsement omitted.]

[fol. 71] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to Appeal—Entered March 28, 1935

Upon consideration of the petition of C. S. Tuttle, et al., etc., this day presented;

It is ordered that an appeal be allowed to C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as members of a Committee constituted under the terms of the deposit agreement dated April 28, 1933 relating to first mortgage bonds of Granada Hotel Corporation, petitioners herein, from the order entered in the above matter March 2, 1935 by the District Court of the United States for the Eastern District of Illinois approving the petition in the above entitled cause as properly filed and as filed in good faith, and granting certain other relief, the appellants to file an appeal bond in the sum of $250.00.

It is further ordered that said appeal shall be returnable to the United States Circuit Court of Appeals for the Seventh Circuit within ten days and that a citation issue in the usual form directed to Sam Harris, J. Rose, and I. Gordon, petitioning creditors below, commanding them to appear before the United States Circuit Court of Appeals for

the Seventh Circuit, and that a transcript of the record, proceedings, pleadings, papers, and evidence upon which said order was entered, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed: No. 59143. United States of America, Circuit Court of Appeals in and for the Seventh Circuit. In the Matter of Granada Hotel Corporation, Debtor. Order. Filed March 28, 1935, Frederick G. Campbell, Clerk. Defrees, Buckingham, Jones & Hoffman, 105 South La Salle Street, Chicago.

[fol. 72] Citation, in usual form showing service on Sam Harris et al., filed April 4, 1935, omitted in printing.

[fols. 73 & 74] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 75] [Caption omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

In the Matter of GRANADA HOTEL CORPORATION, Debtor

5488

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. Sturm and E. A. Kilmer, as Members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933, etc., Appellants,

vs.

SAM HARRIS, J. ROSE and I. GORDON, Petitioning Creditors, Appellees

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

(Cause transferred from the Eastern District of Illinois)

MEMORANDA AS TO APPEAL PAPERS

And afterwards, to-wit: On the twenty-eighth day of March, 1935, there was filed in the office of the Clerk of this

court, a Notice of Appeal, which said Notice is not copied here as the same appears on page 66 of the Printed Record in this cause, certified herewith.

And on the same day, to-wit: On the twenty-eighth day of March, 1935, there was filed in the office of the Clerk of this court, a Petition for Leave to Appeal, which said Petition is not copied here as the same appears on pages 67 to 69 Inclusive of the Printed Record in this cause, certified herewith.

And on the same day, to-wit: On the twenty-eighth day of March, 1935, there was filed in the office of the Clerk of this court, an Assignment of Errors, which said Assignment of Errors is not copied here as the same appears on Pages 69 and 70 of the Printed Record in this cause, certified herewith.

[fol. 76] And on the same day, to-wit: On the twenty-eighth day of March, 1935, an Order was entered Allowing Appeal, which said Order is not copied here as the same appears on Page 71 of the printed record in this cause, certified herewith.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER SETTING CAUSE, ETC.—March 28, 1935

It is ordered by the court that the transcript of the record in this cause be filed in this court within 10 days from this date; brief for appellant to be filed within 10 days thereafter; brief for appellee to be filed within 10 days thereafter, and that this cause be set down for hearing on May 22, 1935.

MEMORANDUM AS TO CITATION

And afterwards, to-wit: On the fourth day of April, 1935, there was filed in the office of the Clerk of this court, a Citation, which said Citation is not copied here as the same appears on Page 72 of the Printed Record in this cause, certified herewith.

[fol. 77] Bond on appeal for $250.00, approved and filed April 4, 1935, omitted in printing.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDDER APPROVING BOND—April 4, 1935

It is ordered that the bond on appeal, filed in this court in this cause this date, be, and the same is hereby approved.

[fols. 79 & 80] Appearances of counsel omitted in printing.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MINUTE ENTRY—May 22, 1935

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Don Kenneth Jones, counsel for appellants, and by Mr. Frank E. McAllister, counsel for appellees, and the court having heard the same takes this matter under advisement.

[fol. 82] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1934, APRIL SESSION, 1935

No. 5488

In the Matter of GRANADA HOTEL CORPORATION, Debtor

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. Sturm, and E. A. Kilmer, as Members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933, etc., Appellants,

vs.

SAM HARRIS, J. ROSE and I. GORDON, Petitioning Creditors, Appellees

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

(Transferred from the Eastern District of Illinois)

OPINION—Filed June 5, 1935

Before Evans, FitzHenry, and Alschuler, Circuit Judges

Per Curiam:

Concededly there is but one question in this case and that is whether or not, at the time of the filing of the petition under section 77B of the Bankruptcy Act, there was "a prior proceeding in * * * equity receivership * * * pending". The record shows that, prior to the filing of this petition, a bill to foreclose had been filed in the state court by a second mortgagee under which a receiver had been appointed. While that case was pending, the trustee named in the first mortgage appeared in the state court and asked that court to enter an order directing its receiver to report to the trustee and turn over to it the possession of the mortgaged property. The state court entered the order, but the foreclosure case was still pending before the master at the time of the filing of the petition herein and jurisdiction over the property and the trustee remained with that court. This showing was sufficient to sustain the jurisdiction of the bankruptcy court under section 77B, Clark on

[fol. 83] Receivers, Sections 12, 13, 14 and 963, and the District Court so held.

The order of the District Court sustaining the petition is therefore affirmed.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

In the Matter of GRANADA HOTEL CORPORATION, Debtor

5488

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. Sturm and E. A. Kilmer, as Members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933, etc.,

vs.

SAM HARRIS, J. ROSE and I. GORDON, Petitioning Creditors

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

(Cause transferred from the Eastern District of Illinois)

DECREE—June 5, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this court that the Order or Decree of the District Court in this cause appealed from sustaining the Petition, be, and the same is hereby affirmed with costs.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION OF HARRIS F. WILLIAMS, AMICUS CURIAE—Filed June 20, 1935

To the Honorable Judges of said Court:

Comes now Harris F. Williams, as amicus curiæ, and petitioning this honorable court, respectfully shows the following:

1. That your petitioner is an attorney at law admitted to the bar in the state of Illinois and has been practicing law in the state of Illinois for many years last past and is admitted to practice in this honorable court.

2. That your petitioner is attorney for Lott Hotels, Incorporated, an Illinois corporation, debtor, against which corporation a petition has been filed and is now pending in the district court of the United States for the Northern District of Illinois, eastern division, numbered 56286 in [fol. 85] said court, which petition was filed against said Lott Hotels, Incorporated, in said district court under section 77B of the bankruptcy act as amended.

3. That in said proceedings against Lott Hotels, Incorporated, debtor, it appears that there are foreclosure proceedings pending against Lott Hotels, Incorporated, and against its properties in the circuit court of Cook county, Illinois, and that in said foreclosure proceedings, based upon the usual form of trust deeds securing bond issues, a receiver was appointed by the said circuit court of Cook county, Illinois, and that said receiver is in the possession of the property of the debtor as described in said trust deeds.

4. That it is the contention of the petitioners in the said proceedings in the said district court of the United States, wherein Lott Hotels, Incorporated, is debtor, that the said foreclosure receivership constitutes a prior equity receivership pending within the meaning of said section 77B of the bankruptcy act as amended, while it is the contentin of Lott Hotels, Incorporated, as represented by this petitioner, that the said foreclosure receivership does not constitute a prior equity receivership pending within the meaning of said section 77B of the bankruptcy act as amended, and that said question is jurisdictional under said section 77B as amended.

5. That the same question as to a prior equity receivership pending is involved in the above entitled cause, and petitioner is of the opinion that the opinion rendered by this honorable court in the above entitled cause under date of June 5, 1935, is erroneous.

6. Wherefore, petitioner prays that he may be allowed to appear in the above entitled cause, as a friend of the court,

and that he may be allowed to file a petition for rehearing, as amicus curiæ, within ten days in the above cause, and that petitioner may have such other and further relief as may be necessary or proper in the premises.

And petitioner will ever pray.

Harris F. Williams, Petitioner.

[fol. 86] *Duly sworn to by Harris F. Williams. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING, ETC.—June 20, 1935

Now comes Harris F. Williams and presents a petition for leave to file a petition for a rehearing in this cause as Amicus Curiæ.

On Consideration Thereof: It is ordered that the said petition be and it is hereby granted, and that the petition for a rehearing may be filed within 10 days from this date.

[fol. 87] Appearance of counsel omitted in printing.

[fol. 88] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION OF JOSEPH H. SCHWARTZ, AMICUS CURIÆ—Filed June 27, 1935

To the Honorable Judges of Said Court:

Now comes Joseph H. Schwartz, as amicus curiæ, and petitioning this honorable court, respectfully shows the following:

1. That your petitioner is an attorney at law admitted to the bar in the State of Illinois, and has been practicing

law in the State of Illinois for several years last past and is admitted to practice before the bar of this honorable court.

2. That your petitioner is a member of the law firm of Schwartz and Cooper, attorneys for the petitioning creditors who filed an involuntary petition in bankruptcy under Section 77B of the Acts of Congress relating to bankruptcy, as amended and supplemented, against Lott Hotels, Incorporated, an Illinois corporation, debtor, in [fol. 89] the District Court of the United States, for the Northern District of Illinois, Eastern Division, said cause being docketed as case #56286.

3. That it is alleged in the aforesaid involuntary petition for reorganization that there are proceedings pending against Lott Hotels, Incorporated, a corporation, in the Circuit Court of Cook County, Illinois, to foreclose the lien of trust deeds against its properties; that said foreclosure proceedings were instituted and a receiver appointed therein prior to the filing of said involuntary petition for reorganization; that said receiver is in possession of all or nearly all of the property of said debtor.

4. That it is the contention of the petitioning creditors who instituted the reorganization proceeding now pending in the District Court of the United States, as aforesaid, that said foreclosure receivership constitutes a pending prior equity receivership within the purview and meaning of Section 77B of the Bankruptcy Act, as amended and supplemented, which contention is controverted by the debtor therein; that the issue thereby created is jurisdictional under the aforesaid section of the Bankruptcy Act.

5. That a similar issue is involved in the above entitled cause and your petitioner believes that the opinion rendered by this honorable court in said cause under date of June 5th, 1935, is a correct exposition of the law in cases of this character and should be maintained upon the rehearing of this cause in order to protect vital interests of large classes of creditors.

6. Your petitioner further represents that Harris F. Williams, attorney for Lott Hotels, Incorporated, has filed

his petition with this honorable court as amicus curiæ, and was granted leave to file a petition for rehearing.

Wherefore, your petitioner prays that he may be allowed to appear in the above entitled cause as a friend of the court, and that he may be allowed to file a printed answer to the petition of Harris F. Williams within ten days after the petition of Harris F. Williams is filed, and that your petitioner may have such other and further relief as may be necessary or proper in the premises, and your petitioner will ever pray.

Joseph H. Schwartz, Petitioner.

[fol. 90] *Duly sworn to by Joseph H. Schwartz. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER GRANTING LEAVE TO FILE ANSWER TO PETITION FOR REHEARING, ETC.—June 27, 1935

Now this day comes Joseph H. Schwartz and presents a petition for leave to appear as Amicus Curiæ and file an answer to the petition for rehearing.

On Consideration Whereof: It is ordered that the said petition be, and it is hereby granted, and that the answer to said petition for rehearing may be filed within six days after the filing of said petition for rehearing.

[fol. 91] Appearance of counsel omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MEMORANDA RE PETITION FOR REHEARING

And afterwards, to-wit: On the twenty-eighth day of June, 1935, there was filed in the office of the Clerk of this

court, a Petition for a Rehearing by Amicus Curiae, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the third day of July, 1935, there was filed in the office of the Clerk of this court, an Answer to the Petition for a Rehearing by Amicus Curiae, which said Answer to the Petition for a Rehearing is not copied here.

[fol. 92] And afterwards, to-wit: On the eighth day of July, 1935, there was filed in the office of the Clerk of this court, an Answer to the Petition for a Rehearing by Appellee, which said Answer to the Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the ninth day of July, 1935, there was filed in the office of the Clerk of this court, a Reply of Amicus Curiae to the Answer to the Petition for a Rehearing of Amicus Curiae, which said Reply is not copied here.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 26, 1935

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

MEMORANDUM RE ISSUANCE OF MANDATE

And afterwards, to-wit: On the thirtieth day of July, 1935, the Mandate of this court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE—Filed Aug. 2, 1935

To Frank E. McAllister, 1 North LaSalle Street, Chicago, Attorney for Appellees:

You Will Please Take Notice that on August 2nd, 1935, the undersigned attorney for Appellants in the above entitled cause will, at the hour of ten-thirty o'clock in the forenoon of said day appear before the Hon. Samuel Alschuler, in his chambers in the Federal Building and present a motion to stay the mandate of the Circuit Court of Appeals for sixty days (60) pending the taking of the necessary steps to obtain a review and judgment of the Supreme Court of the United States.

Defrees, Buckingham, Jones & Hoffman, Attorneys for Appellants.

[fol. 94] Received a copy of the foregoing notice this — day of August, A. D. 1935.

Frank E. McAllister, Attorney for Appellees.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER RECALLING AND STAYING MANDATE—Aug. 2, 1935

Now this day comes counsel for appellant and presents a motion for the recall and stay of the Mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On Consideration Whereof: It is now here ordered that the Mandate in this cause be, and the same is hereby recalled and stayed until the further order of this court.

It is further ordered that counsel for appellant proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and,

upon the filing of said petition, file in this court proof of the filing of said petition in said court.

[fol. 95] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 96] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,982. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 428. C. S. Tuttle, Albert J. Peterson, et al., etc., petitioners, vs. Sam Harris, J. Rose and I. Gordon, petitioning creditors. Petition for writ of certiorari and exhibit thereto. Filed September 6, 1935. Term No. 428, O. T., 1935.

FILE COPY

FILED
SEP 6 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 428

IN THE MATTER OF
GRANADA HOTEL CORPORATION,

Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM, AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,

Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,

Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI.

Counsel for Petitioners:
GEORGE T. BUCKINGHAM,
DON KENNETH JONES,
VINCENT O'BRIEN,
105 S. La Salle Street,
Chicago, Illinois.

Counsel for Respondents:
FRANK E. McALLISTER,
1 N. La Salle Street,
Chicago, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

IN THE MATTER OF

GRANADA HOTEL CORPORATION,

Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,

Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,

Respondents.

To the Honorable the Justices of the Supreme Court of the United States:

And now come C. S. Tuttle, Albert, J. Peterson, Lewis W. Riddle, W. G. Sturm and E. A. Kilmer, as Members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933, for the protection of holders of first mortgage bonds of Granada Hotel Corporation, and respectfully petition that this court issue the Writ of Certiorari for review of the decision of the United States Circuit Court of Appeals in and for the Seventh Circuit, in the above entitled cause, and in support of their petition respectfully show unto your Honors as follows:

STATEMENT OF MATTER INVOLVED.

Three creditors filed an involuntary petition in the District Court of the United States for the Northern District of Illinois, against the Granada Hotel Corporation to bring about a reorganization under Section 77B of the Bankruptcy Act. The jurisdictional allegation was that a receiver of the assets and property of the debtor had been named by the Superior Court of Cook County, Illinois, and that said proceedings were still pending in said Superior Court. (R. 5, Paragraph VIII). Acts of Bankruptcy, the alternate jurisdictional requirements for Section 77B of the Bankruptcy Act, were not alleged.

Petitioners appeared specially, and, *inter alia,* showed to the court that prior to the filing of the petition in the District Court the receiver in the State Court action (simple mortgage foreclosure) had been discharged (R. 13-16-18-41); that while the foreclosure suit itself was still pending, City National Bank and Trust Company, Successor Trustee under the mortgage indenture, had taken possession of the property under its contract right as determined by the laws of Illinois, and was in possession of said property after condition broken under the terms of its trust deed (R. 15-18); that hence there was no prior pending equity receivership as alleged in the petition, and that hence jurisdiction did not exist in the District Court upon the petition there on file.

The contention was rejected. The trial Court's views appear from the Colloquy (R. 45-54) and the memorandum opinion (R. 54-56).

An appeal was duly taken to the Seventh Circuit Court of Appeals and the District Court's order upholding its jurisdiction was there affirmed. That Court filed a short *per curiam* opinion which appears on Page 82 of the Record. Thereafter petitions for rehearing were filed and on July 26, 1935, denied. (R. 92).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The question involved is jurisdictional. The portions of Section 77B of the National Bankruptcy Act, as amended, and that are material, are Sub-sections (a) and (i). The principal requirement is that in an involuntary proceeding either acts of bankruptcy must have been committed within four months or else "a prior proceeding in bankruptcy or equity receivership is * * * pending." The United States Circuit Court of Appeals for the Seventh Circuit has held in the case at bar that the appointment of a receiver in a foreclosure proceeding against a single piece of real estate owned by a corporation constitutes a "pending equity receivership" and is sufficient ground under the statute for the institution of bankruptcy proceedings for the entire property of such corporation. Whereas, on the other hand the United States Circuit Court of Appeals in and for the Second Circuit has on the same identical question held precisely the contrary, namely, that a mortgage foreclosure with appointment of a receiver is not a "pending equity receivership" within the intent and purview of the Act. The decisions of the United States Circuit Court of Appeals for the Second Circuit were delivered in the following cases: *In re 2168 Broadway Corporation,* July 15, 1935, C. C. H. Par. 3546; *In re Allen,* July 15, 1935, C. C. H. Par. 3547; and *In re Broadway-Barclay Corporation,* same as *Allen* case.

Various District courts have expressed contrary views. Those holding in line with the decisions of the Seventh Circuit Court of Appeals are as follows: *In re Granada Hotel Corporation,* 9 Fed. Supp. 909; *In re Surf Building Corporation,* C. C. H. Par. 3076; *In re Flamingo Hotel,* C. C. H. Par. 3007, all by Judge Lindley in the Northern

District of Illinois, and *In re Broadway-Barclay Corporation,* Southern District of N. Y., with no opinion (reversed by C. C. A.)

Those holding in line with the Second Circuit Court of Appeals are as follows: *In re Laclede Gas Light Company,* C. C. H. Par. 3001, Eastern District of Missouri; *In re Draco Realty Corporation,* C. C. H. Par. 3492, Southern District of N. Y.; and *In re 2168 Broadway Corporation,* C. C. H. Par. 3448, Southern District of N. Y., affirmed.

The question, being jurisdictional, is of utmost importance and of public concern. Many involuntary proceedings under Section 77B predicated entirely upon an allegation of a simple mortgage foreclosure receivership are pending in the Northern District of Illinois, and many such actions are pending in various circuits of the Federal Judiciary, as we are informed. The statute is new and has not been construed by this court upon the single point of law here presented. One Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same question. Each decided an important question in federal law which has not been but should be settled by this court.

Petitioners are submitting herewith a brief in support of this petition.

Wherefore, we respectfully submit that the Writ of Certiorari should be issued in this cause.

GEORGE T. BUCKINGHAM,
DON KENNETH JONES,
VINCENT O'BRIEN,
Counsel for Petitioners.

FILE COPY

SEP 6 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 428

IN THE MATTER OF
GRANADA HOTEL CORPORATION,
Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM, AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,
Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,
Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF SUPPORTING PETITION FOR CERTIORARI WITH APPENDIX.

Counsel for Petitioners:
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THE BUCKINGHAM-WARREN PRINTING COMPANY, 540 WEST ADAMS, CHICAGO

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SUMMARY OF ARGUMENT.

I.

A foreclosure receivership is not a prior equity receivership pending within the meaning of subdivision (a) of section 77B of the bankruptcy act as amended. By "a prior equity receivership pending" is meant a general equity receivership for a corporation and its property as distinguished from a special receivership, such as that in a foreclosure, which relates to specific property, and does not involve the corporation and its affairs generally. This becomes very clear when section (3) of the bankruptcy act, particular reference being had to the 5th act of bankruptcy, is considered in connection with the various pertinent provisions of 77B, and when the authorities are also considered.

Standard Accident Insurance Company v. **Sheftall**, 53 Fed. (2d) 40 at 41, where it was held, in view of the general purposes of the bankruptcy act, that a general receivership is referred to in connection with the 5th act of bankruptcy and not a receivership for specially described property as in a mortgage foreclosure.

State of Texas v. **Porter**, 74 Fed. (2d) 269 at 271, following the Sheftall case.

The Carasaljo Hotel Company, 8 Fed. (2d) 469 at 471, announcing the same principle.

NOTE: Where an opinion is not found except in Commerce Clearing House, Inc., service, our citations, in our list of authorities, are to that service; for example, **In re 2168 Broadway Corporation, CCH. Para. 3448.**

Wiggins v. **Hummel**, 295 Fed. 510-11, where the court passed upon the 5th act of bankruptcy with reference to "a general assignment for the benefit of his creditors", holding that such an assignment must cover all the property of the debtor and not amount to a mere special assignment with respect to part of it.

Clark on Receivers, Vol. 1, 2nd Ed., pages 24 and 25.

Schmidtman v. *Atlantic Phosphate and Oil Corporation*, 230 Fed. 769 at 771.

In re 2168 Broadway Corporation, CCH Para. 3448 (District Court).

In re Draco Realty Corporation, CCH Para. 3492.

Bryan v. *Welch*, 74 Fed. (2d) 964 at 970.

In re 2168 Broadway Corporation, CCH. Par. 3546 (Court of Appeals).

In re Broadway Barclay Corporation—In re Allen, CCH. Par. 3547 (Court of Appeals).

II.

The cardinal rule of statutory construction is that the legislative intent must be deduced from a view of the entire statute and of every material part thereof taken and construed together. That means, in this instance, that section (3) of the bankruptcy act, 5th act of bankruptcy; that part of subdivision (a) of 77B, which is jurisdictional, and which relates to a prior proceeding in bankruptcy or equity receivership pending; that part of subdivision (a) of 77B which provides that the court shall exercise all powers, not inconsistent with 77B, which a federal court would have, had it ap-

pointed a receiver in equity for the property of the debtor; that part of subdivision (a) of 77B relating to the jurisdiction of the bankruptcy court over subsidiary corporations; part (10) of subdivision (b) of 77B relating to priorities as if a receiver in equity of the property of the debtor had been appointed; also that part of (10) of (b) of 77B relating to claims rejected by a receiver in equity or a trustee in bankruptcy; part (2) of (c) of 77B relating to same powers as those exercised by a receiver in equity; subdivision (i) of 77B, which is administrative, not jurisdictional, providing that proceedings under 77B may be had as provided in subdivision (a) even though there be a receiver or trustee for all or any part of the property of the corporation in another court; and subdivision (k) of 77B providing that other provisions of the bankruptcy act shall apply to proceedings under 77B unless inconsistent therewith; will all have to be considered and construed together and as a part of the entire bankruptcy act as amended.

2 Lewis Sutherland on Stat. Const., 2nd Ed. Section 368.

United States v. **Ewing**, 237 U. S. 197 at 200; 59 Law Ed. 913 at 915.

People v. **Continental Illinois Bank**, 360 Ill. 454 at 457.

When all these provisions of the bankruptcy act, together with the authorities cited, are considered, the conclusion that a foreclosure receivership is not "a prior equity receivership pending" within the meaning of 77B is inescapable. When, in subdivision (k), of 77B, congress provided that all other provisions of the bankruptcy act, with certain exceptions, should apply to proceedings under 77B, it adopted the interpreta-

tions theretofore given to such other provisions by the courts and those interpretations are a part of the law. It follows that the definition or the meaning of an equity receivership under the 5th act of bankruptcy is fixed by the cases cited under I of this summary. No different meaning can be used under 77B.

III.

There is an idea which is quite prevalent that acts of congress may be interpreted through an examination of the congressional debates thereon. This is an error. The meaning of an act of congress is to be determined from the language used therein, and not from the debates in congress or through any extrinsic source.

United States v. **Trans-Missouri Freight Association,** 166 U. S. 290; 41 Law Ed. 1007 at 1020.

Duplex Printing Company v. **Deering,** 254 U. S. 474; 65 Law Ed., 349 at 360; 16 A. L. R. 196 at 208.

United States v. **United Shoe Machinery Company,** 234 Fed. 127 at 147 (refusing to consider records of debates in congress in construing Clayton act.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

IN THE MATTER OF
GRANADA HOTEL CORPORATION,
Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,
Petitioners.

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,
Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The error of the Court below lies in the holding that a foreclosure receivership, succeeded by a trusteeship (trustee in possession), under orders of a state court, constitutes

a prior equity receivership pending under Section 77B of the Bankruptcy Act, as amended.

The question as to whether "a prior * * * equity receivership is * * *, pending" under Subdivision (a) of Section 77B of the Bankruptcy Act, as amended, is **jurisdictional**, and is, therefore, very important.

The Pertinent Facts.

The creditors' petition in the above cause was filed against the Granada Hotel Corporation, debtor, in the District Court (R. 5) charging that a receiver had been appointed in the state court "of the assets and property of the debtor" (R. 5, Par. VIII) and that the proceedings in that behalf were still pending. The intervening petition of the City National Bank and Trust Company of Chicago (R. 12, 13, Pars. 4, 8) and the answer (R. 15) of appellants (a bondholders' committee) show that there was a foreclosure in the state court on a second mortgage as to the real property described in the mortgage, that first mortgage foreclosure proceedings had been started and were still pending through cross-bill filed in the second mortgage suit, and that, prior to the filing of the petition under 77B, the state court, by appropriate orders, had discharged the receiver and had placed the first mortgage trustee in possession of the property under the terms of the trust deed, as mortgagee or trustee in possession after condition broken. These facts, as set up in the intervening petition and the answer, were established at a hearing held in the District Court (R. 23, *et seq.*). Hence, it was claimed on behalf of the intervenor and the bondholders' committee (the debtor apparently having allowed the matter to go by default) that there was no prior equity receivership pending, as contemplated by 77B, and that the court was without jurisdiction (no act of bankruptcy being otherwise alleged).

The trial court took the view that a foreclosure receivership was a prior equity receivership pending within the meaning of 77B, and that the discharge of the receiver and the placing of the trustee in possession, by orders of court, did not change the status (R. 25, 26 and see opinion R. 54 to 56) and the Court of Appeals for the Seventh Circuit has sustained that view.

The points made in this court by petitioners are the same as those made by them in the court below, namely, (1) that the foreclosure receivership was not a prior equity receivership pending within the meaning of 77B, and (2) that, even if the foreclosure receivership could be construed as a prior equity receivership pending, the new status with the trustee in possession could not be so construed.

So far as we have been able to ascertain, no opinion has been written on the instant question under 77B wherein all of the pertinent parts of the statute have been analyzed, compared and construed together and wherein all the authorities have been cited, though, as will be seen, there are some opinions where this has been done in part, in each of which the holding has been that a foreclosure receivership is not a prior equity receivership pending.

It is apparent, on a moment's reflection, that a foreclosure case, even though there be a receiver, can not be construed as a pending equity receivership for a corporate debtor. There are fundamental reasons for this. A given corporate debtor might own a dozen hotels, as some of them do, and one of the dozen might be encumbered while the others might be clear of encumbrance. The corporation might be amply solvent and abundantly able to pay all its debts and yet there might be a foreclosure proceeding

against the one encumbered hotel and there might be a custodian receivership for that property. Certainly, it couldn't be said under such circumstances that the corporation was in an equity receivership as contemplated by 77B. Furthermore, a receiver appointed in a foreclosure proceeding is really a custodian. He is appointed in accordance with the terms of the mortgage or the trust deed. He does not have title to the property and can not sell it or dispose of it at all. He can only hold possession of it as custodian during the period covered by the foreclosure proceedings. On the other hand, if a corporation is in an equity receivership, distinguishing a corporation from a part or all of its assets, the receiver has all the property and may sell it and dispose of it under orders and decrees of court, and the affairs of the corporation may be wound up in an equity receivership for the corporation, or sometimes there may be an equitable reorganization. A property custodian receivership under a foreclosure and an equity receivership for a corporate debtor are fundamentally different and can not possibly be interpreted as amounting to one and the same thing.

A receivership in a foreclosure proceeding is incidental and not necessary. Many foreclosures are carried through without any receivership at all. On the other hand, the appointment of a receiver, while in a sense incidental, may be necessary as a part of the proceedings where the affairs of a corporation are to be wound up. It does not seem possible that Congress could have had in mind the idea that the mere appointment of a receiver in a foreclosure case would constitute sufficient grounds upon which to throw a debtor into bankruptcy. As we understand an equity receivership, it is one where the affairs of the corporation may be wound up. Under 77B, the affairs of a corporation may be wound up by reorganization or ultimately, if there is no reorganization, by liquidation. If all the affairs of a

corporation are to be readjusted, proceedings under 77B hold out many advantages over equity proceedings, and this must have been the thought that Congress had in mind when it referred to prior equity receiverships.

About the first case on this subject of "prior equity receivership" was that of *Laclede Gas Light Company,* decided on June 26, 1934, by the United States District Court for the Eastern District of Missouri (C. C. H., Par. 3001, apparently not otherwise reported). The court discussed the matter quite fully and held that a receivership under a foreclosure was not a prior receivership within the meaning of 77B.

In the *Flamingo Hotel Company* case, decided in the Northern District of Illinois on August 9, 1934, (C. C. H., 3007) it was held, by inference at least, that a receiver in a foreclosure case constituted a prior equity receivership, but there is no such discussion on the subject as that found in the Missouri case.

In the *Surf Building Corporation* case, decided in the Northern District of Illinois on October 17, 1934, (C. C. H., 3076) the court apparently proceeded on the theory that a foreclosure receivership constituted a prior equity receivership. Near the end of the opinion in this *Surf Building Corporation* case, the court comments upon the subject of foreclosure receiverships and prior equity receiverships. The court states that a receivership in equity is always incidental to some other ultimate purpose and that equity jurisprudence recognizes no such proceedings as one which asks a receivership as the only relief and then goes on to say that receivers are always appointed in subordination of and incidental to the main purpose of the litigation. And that is all the court has to say on the subject. The court did not go far enough. In a proceeding for the dissolution and the winding up of the affairs of a corporation,

it is essential that a receiver shall be appointed who shall take possession of the property of the corporation and administer it and dispose of it in accordance with the rights of the parties as fixed by the orders and decrees of court.

It has been suggested that section 3a of the Bankruptcy Act is helpful in determining what is meant by a prior equity receivership. Section 3a defines acts of bankruptcy, and the 5th act of bankruptcy as there defined is as follows:

> Or (5) made a general assignment for the benefit of his creditors; or while insolvent, a receiver or a trustee has been appointed, or put in charge of his property.

As we read the foregoing language, the meaning is that an act of bankruptcy has been committed when the debtor, being insolvent, has had a receiver or a trustee put in charge of his property. That would seem to be an equity receivership as distinguished from a contractual custodian receivership under foreclosure proceedings. There might be receivership proceedings without a receiver, but there couldn't be a receivership without a receiver.

Subdivision (i) of 77B provides that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors, as provided in subdivision (a) of this section."

In the language which we quoted from subdivision (i), it is to be noted that the provision is that "a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section."

In other words the meaning and intent are that a peti-

tion or an answer may be filed even if the facts exist as described in (i) but the filing must be "as provided in subdivision (a) of this section." **Subdivision (i) is wholly administrative, and not jurisdictional, as hereinafter pointed out more fully.**

Turning to subdivision (a), we come back to the point of beginning and the language is as follows: "If a prior * * * equity receivership is not pending." Manifestly, it was not the intent of the Congress that "a prior equity receivership" should have two or more meanings in the same act.

Hence, we say it follows that the reasoning of the court in the *Laclede Gas Light Company* case, C. C. H., Par. 3001, is correct.

In the case of *Bryan* v. *Welch,* 74 Fed. (2d) 964, decided by the United States circuit court of appeals for the tenth circuit on January 7, 1935, the court gave consideration to this subject of a prior equity receivership, or an equity receivership. In that case the alleged debtor was the Royalties Company, a common law trust, and the trust was treated and considered as a corporation. Treating the trust as a corporation was proper under the sixth subdivision of the first section of the bankruptcy act where it is stated that corporations shall include unincorporated companies and associations and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument (see page 9 of Gilbert's Collier on Bankruptcy, Third Edition).

In this case of *Bryan* v. *Welch,* there was an original involuntary petition and there were also some intervening petitions. The petitions in that case did not allege an act of bankruptcy within four months but each of them alleged the pendency of a prior state court receivership. The

grounds alleged in the state court for the appointment of a receiver were mismanagement, waste and dissipation of assets, and fraud on the part of the trustees of the Royalties Company, the common law trust. A receiver had been appointed and the order appointing the receiver authorized the receiver to take possession of all of the assets, and the books and records of the Royalties Company, and to enforce and prosecute claims in its favor, collect moneys due it, and to defend claims and suits against it, and generally to manage, preserve and protect its assets and business.

The court of appeals cited a number of decisions by state courts to the effect that a court of equity, by virtue of its general equitable jurisdiction, at a suit of a stockholder on the ground of fraud, mismanagement, waste and dissipation of assets by the corporate officers, might appoint a receiver for the corporation, to protect and preserve its assets and to continue its business, and, thereafter, when there had been a change of corporate officers or it appeared to be prudent to do so, might restore its property and affairs to its duly constituted corporate authorities. The court then went on to say that if the Royalties Company was to be considered as a corporate entity, the receivership would be an equity receivership, and then the court said: "We conclude that the state court receivership was an equity receivership within the meaning of section 77B."

That opinion, in some respects, coincides with our view of what is meant by a prior equity receivership as that language is used in 77B, and that is a very different situation from that which we have here.

In the instant case, there is no receiver for the debtor. No receiver has been appointed to take possession of all of its assets and of its books and records and no receiver has been appointed to enforce and prosecute claims in

its favor, or collect moneys due it, or to defend claims and suits against it, or to generally manage, preserve and protect its assets and its business. On the contrary, there was only a contractual custodian receivership under the terms of trust deeds on the basis of which foreclosures are sought (then a trustee in possession). The receiver under these trust deeds and in these foreclosure proceedings, and later the trustee in possession, did not have any right to take possession of the assets of the debtor generally; did not have any right to the books and records of the corporation; did not have any right to enforce and prosecute claims in its favor; did not have any right to collect moneys due it; did not have any right generally to manage, preserve and protect its assets and business.

If an effort were to be made to have a receiver appointed for a corporation in a court of equity for the purpose of taking charge of its affiairs generally on the ground that its properties were in a foreclosure receivership, that effort would be ridiculous and would necessarily fail. The law does not recognize any such ground for an equity receivership for a corporation, and never did; and, so far as we know, the law of no state recognizes any such ground. To appoint a receiver under such circumstances would be to deprive the corporation of the right to defend foreclosure suits. For many years, there have been statutory grounds in the different states for the appointment of receivers for corporations—equity receivers—and there are many cases holding that receivers can be appointed only upon such statutory grounds.

It is evident that the debtor in the instant cause was not in a prior equity receivership. This is true whether the prior proceedings were in a state court or a federal court. A foreclosure proceeding in a federal court wouldn't be any different in this regard from a foreclosure proceeding in a state court. Even if there were a prior equity re-

ceivership in a federal court, that court could not, as a pure court of equity, afford to the parties in interest the advantages of 77B, and that is the reason why it doesn't make any difference whether the prior equity receivership, *if there is one,* is in a state or a federal court.

It is to be noted that the language of 77B—"if a prior proceeding in bankruptcy or equity receivership is not pending"—links two similar things together and places them in apposition to each other, and perhaps it can be said that one may shed light on the other. If there were a *proceeding* in bankruptcy or an equity receivership pending, assuming that in either event proceedings were being carried along, it would mean that there was a trustee in the one case or a receiver in the other, holding all the property of the debtor and by whom or through whom, under proper orders of court, the assets of the debtor could be disposed of for the benefit of creditors; the thought or purpose contained in 77B evidently being that if the affairs of the debtor were about to be wound up by proceedings in ordinary bankruptcy or by an equity receivership, then, and in either of such events, resort could be had to the provisions of 77B. Within the meaning of this language, as found in 77B, it could hardly be said that the mere filing of an involuntary petition in bankruptcy or the mere filing of a bill or a complaint for an equity receivership could constitute "a prior proceeding in bankruptcy or equity receivership" pending. If there is no prior proceeding in bankruptcy or equity receivership pending, then there must be an allegation as to an act of bankruptcy committed within four months, as defined in the act as it stood prior to the recent amendments.

The district court, in deciding this *Granada Hotel Corporation* case, (9 Fed. Supp. 909) used the following language:

"The court is not impressed with the contention that

the facts related do not constitute an equity receivership, essential to jurisdiction of this court. As is frequently observed, a receiver is a fiduciary of the court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. The trustee here, likewise, is a fiduciary of the state court, and is acting under the orders, directions and control of that court. Words of themselves are unimportant. Whether the trustee be called a receiver, a guardian, a custodian, or by some other name, it remains, in its essence, a fiduciary in possession of property pending the outcome of foreclosure, holding under the court's order, incidentally to the ultimate purpose of the state proceedings. Consequently there is an equity receivership within the meaning of that term as used by congress."

It seems to us that the district court failed, for one thing, to distinguish between contractual actions *in rem* and personal actions. A foreclosure is an action wherein an alternative decree is entered. If a certain amount of money is not paid by a given date, there will be a sale of the property. If the property sells for enough to satisfy the debt, that ends the matter and the action is wound up as one *in rem*. If the property does not sell for enough to satisfy the debt, there may be a personal deficiency decree against the mortgagor, if the contract calls for it, and in the event of that alternative, there is a personal decree. A receivership under a foreclosure is one that relates to and arises out of a contract, the trust deed or the mortgage, and the property in the receivership, which is really a custodianship, there being no title in the receiver, is to be handled and disposed of in accordance with the contract, and not otherwise. On the other hand, a suit for an equity receivership is one where it is sought to have a receiver appointed for the purpose of taking charge of the affairs of the debtor to the exclusion of the debtor. In an equity receivership, there is a receiver of the debtor corporation, personally, and of all of its property. The language used

in the case of *Bryan* v. *Welch*, 75 Fed. (2d) 964, *supra*, "that Bryan be appointed receiver of the Royalties Company and of all its property, real, personal and mixed of every kind whatsoever, with full power to demand, sue for, collect, receive and take into his possession and preserve its goods, property, assets and choses in action, to take possession of its books and records, and to prosecute and defend all claims for or against it," is the language often used in creating an equity receivership. Such an action is primarily of a personal nature, taking in incidentally all of the property of the debtor with full power over it and complete control of the title. On the other hand a foreclosure receivership, or custodianship, may relate to only a small portion of the debtor's property and may be wholly a *rem* action. When we levy on property under judgments at law, or when we attach property in actions at law, or when we take property on replevin, custodians are often appointed, but they are mere custodians, having no title, but merely preserving the status of the property temporarily, and it seems to us that no stretch of the imagination could construe such a custodianship as an equity receivership. Such reasoning would lead to all sorts of absurd conclusions.

Congress must have meant and intended something definote in the use of the following language:

> "Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over, may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature, and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months" etc.

If there were a prior proceeding in bankruptcy pending, it would be against the corporation personally. There couldn't be a bankruptcy proceeding without a bankrupt. A bankruptcy proceeding may be both personal and *in rem* but it must be personal. Sometimes there is no property—no *rem*. We think this is helpful in the matter of determining what is meant by a prior equity receivership. It seems to us to be obvious that Congress meant a receivership for the corporation just the same as it meant bankruptcy for the corporation—not a mere custodianship for the property of the corporation or a part of it. And we repeat that this language must have and must be so interpreted as to have a definite meaning. It can't mean one thing in one case and something else in another case as that would tend to endless confusion.

There is another thought in connection with the interpretation of this language,—"if a prior proceeding in bankruptcy or equity receivership is not pending",—which must not be overlooked. The reference to an *equity* receivership and meaning must be given to the word "equity". The act does not refer to a mere receivership. The word "receivership" is very broadly used both in law and in equity. There may be law receiverships, contractual receiverships, so called, and other receiverships, depending upon the codes and the practice in different states. We are dealing with a law which relates to the whole United States and every state thereof and the words "equity receivership" must be given a meaning which will be good in every state. The language used by the District Court in its opinion would cover almost any sort of custodianship or receivership whether equitable or otherwise. The court makes the two words, "equity receivership", cover a receiver, whether in law or in equity, a guardian, a custodian, or any other name, where the appointment is by the court. Obviously, that is not what is meant by the language with which we are

dealing. Even in Illinois, there may be a receiver appointed by a court of record in a garnishment or an attachment suit. Under section 24 of chapter 62 of Smith-Hurd Illinois Revised Statutes of 1933, relating to garnishment, there is a provision that if the garnishment proceeding be in a court of record, the court may appoint a receiver to take possession, collect or otherwise dispose of any goods, chattels, choses in action or effects, belonging to the defendant, and make all orders in regard thereto which may be necessary or equitable between the parties; meaning that the court has power to appoint a receiver for the goods and chattels reached by the garnishment for the benefit of the parties to the suit. In the same way, if a so called foreclosure receivership is for the benefit of some one or more parties to the suit and is not for the benefit of all creditors or of other parties generally; whereas, an *equity* receivership for a corporation is one where the court, through its receiver, takes possession of the corporate debtor and of all of its property, for the purpose of protecting the rights not only of the parties to the suit but also for the purpose of protecting the rights of all parties in interest, just as a bankruptcy proceeding is carried on for the benefit of all who may be interested. Certainly it could not be said that it would be an act of bankruptcy under 77B if some state court should appoint a trustee, or a receiver, or a guardian, or a custodian, or an official by some other name, for the purpose of disposing of property, specifically mentioned, in an attachment suit, or a garnishment suit, or a replevin suit, or any other suit in a state court for the purpose of handling such property for the benefit of those who might have contractual or statutory rights therein.

The language which we are considering makes an equity receivership in effect a new act of bankruptcy for purposes of 77B and then goes on to say that if there is no prior pro-

ceeding in bankruptcy or equity receivership pending that the debtor must have committed an act of bankruptcy within four months, obviously referring to other acts of bankruptcy as described in the bankruptcy act.

In the laws and the codes of the various states of the union there are numerous provisions for the appointment of guardians, custodians, receivers and other like officials where the purpose is to take care of the rights of the parties who are interested in the particular suit in which such action may be taken. In Illinois, a corporation might have some of its property reached by attachment or garnishment and in such a case a court of record could appoint a receiver. Would anybody contend that such a "receivership" was an equity receivership? The answer is obviously in the negative.

Section 77B is new and is more or less involved. Interpretations of its provisions are unsettled, and it is quite apparent that many of its provisions have not been thoroughly considered and fully understood by those who have dealt with them. We feel sure that the meaning of a "prior equity receivership" will ultimately be determined to be some such a receivership as is described in *Bryan* v. *Welch*, 74 Fed. (2d) 964, *supra*.

Another Suggestion on Equity Receiverships.

Where there is an attachment receivership or a foreclosure receivership or other receivership relating to specific property of a corporation under contractual or special statutory claims, the jurisdiction of the court does not cover the affairs of the corporation generally but touches the corporation only for the purpose of making disposition of the particular property involved. If a court, in an attachment suit or a foreclosure suit, were to undertake to appoint a receiver for a debtor corporation generally, any

order entered in that behalf would be void because the court would have no jurisdiction to enter it. It necessarily follows that such limited receiverships are not equity receiverships within the meaning of 77B. The language of 77B is that "if a prior proceeding in bankruptcy or equity receivership is not pending." A prior proceeding in bankruptcy would necessarily be a liquidating proceeding, and these words as to a prior proceeding in bankruptcy being immediately followed by "or equity receivership," it would necessarily seem to follow that the words "equity receivership" were intended to mean a liquidating proceeding. It seems to us to be impossible to escape this conclusion. Furthermore, 77B is specifically designed "for the relief of debtors." In other words, the section is a debtor section and not a creditor section. Equity receiverships are often for the benefit of the debtor. Section 77B enlarges those benefits and that is one of the principal reasons for its enactment.

In *Smith, Receiver* v. *McCullough*, 104 U. S. 25 at 28-9; 26 Law Ed. 637 at 639; the court held that a receiver in a foreclosure action is not a receiver of any property except that covered by the mortgage.

In *Central Trust Company of New York* v. *Worcester Cycle Mfg. Co.*, 114 Fed. 659 at 662 and 663 and other pages there is a discussion of the distinction between general receiverships and special receiverships, and the court held that an order appointing a receiver in a suit to foreclose a mortgage, although broad in its terms, and purporting to extend to all of the property of the mortgagor, should not be construed to cover property not included in the mortgage. The receiver, the court stated, "was not constituted either a statutory or equitable general receiver of the corporation, but merely a custodian of the mortgaged property."

In *Scott* v. *Farmers' Loan and Trust Company,* 69 Fed. 17 at 20, it was held that "the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property, pending the foreclosure, gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage." The further holding was that the court could make no order with respect to any property other than that described in the mortgage.

In the case of *In Re Richardson's Estate,* 294 Fed. 349 at 357, the court held, citing numerous authorities, that "a court can not appoint a receiver to take charge of property which is not involved in the litigation, or to take charge of all of a debtor's property, including that which is not, as well as that which is, specially bound for the payment of the claim in suit."

From the foregoing, it must be entirely clear, on principle, that a foreclosure receivership is special, being confined to the particular property under foreclosure, and that it is entirely different from a general equity receivership for a corporation and its property such as is obviously contemplated by 77B.

We come now to the further consideration of the various statutory provisions involved and to the citation of authorities, defining equity receiverships within the meaning of the bankruptcy act, which, to our mind, are conclusive to the effect that a foreclosure receivership is not a prior equity receivership pending as contemplated under 77B.

Meaning of Prior Equity Receivership Pending.

Bearing in mind the rule of statutory construction, we shall give special consideration to the following parts of the bankruptcy act as amended:

(1) Section (3) of the act, defining acts of bankruptcy, especially the 5th act of bankruptcy, which makes it an act of bankruptcy if, while a person is insolvent, a receiver or a trustee has been appointed or put in charge of his property.

(2) Subdivision (a) of 77B, particularly that portion relating to a prior proceeding in bankruptcy or equity receivership.

(3) Subdivision (a) of 77B providing that the bankruptcy court may exercise all powers, not inconsistent with 77B, which a federal court would have, had it appointed a receiver in equity of the property of the debtor.

(4) Subdivision (a) of 77B as relating to the jurisdiction of the bankruptcy court of subsidiary corporations.

(5) Part of (10) of subdivision (b) of 77B as relating to priorities of unsecured claims over existing mortgages as if a receiver in equity of the property of the debtor had been appointed by a federal court.

(6) Also in (10) of (b) of 77B, as relating to claims rejected by a trustee or receiver in bankruptcy or a receiver in equity.

(7) In (2) of (c) of 77B, that part relating to what the court shall have power to do, reference being made to "the same powers as those exercised by a receiver in equity," etc.

(8) Subdivision (i) of 77B, which is administrative, not jurisdictional, and which provides that proceedings under 77B may be had as provided in subdivision (a) even though there be a receiver or trustee for all or any part of the property of the corporation in another court.

(9) Subdivision (k) of 77B providing that "all other provisions of this act" (meaning the bankruptcy act) "except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section," etc.

Subdivision (k) of 77B provides that "all other provisions of this act" (meaning the bankruptcy act) "except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'. 'Bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication and such order shall have the same consequences and effect as an order of adjudication."

Section three of the bankruptcy act defines acts of bankruptcy. The fifth act of bankruptcy is defined as follows: "or made a general assignment for the benefit of his creditors; or while insolvent, a receiver or a trustee has been appointed, or put in charge of his property."

In *Standard Accident Insurance Company* v. *Sheftall,* 53 Fed. (2d) 40, decided by the United States circuit court of appeals for the 5th circuit on October 28, 1931, this question of the meaning of a receivership, as defined in the fifth act of bankruptcy, was before the court. The court held that the receivership contemplated by the act was a general equity receivership and not a special receivership. The court said:

> In view of the general purposes of the bankruptcy act, we understand a general receivership to be referred to, and not one for specially described property, as in a mortgage foreclosure or an effort to enforce some other lien against specific property. The complainant in the bill under discussion did not seek to sequester in equity described property only, but sought for and obtained a general receivership for all the property of the construction company wherever situated, thus withdrawing it from the claims of all common creditors except by intervention in the receiver.

> ship. We have no doubt that this is such a receivership as was contemplated by the above-quoted words of the statute. The fact that the judgment lien extends to all the property, and will not be invalidated by a bankruptcy, does not prevent an adjudication.

In that case there had been a receiver appointed to take charge of the affairs of the corporation generally.

This case has been followed by the same court in *State of Texas* v. *Porter,* 74 Fed. (2d) 269, decided on January 11, 1935.

The same principle is announced in *The Carasaljo Hotel Company* case, 8 Fed. (2d) 469, decided by the court of appeals for the 3rd circuit.

The fifth act of bankruptcy as above quoted covers "a general assignment for the benefit" of creditors.

Such an asignment must cover all the property of the debtor and not amount to a mere special assignment or special agreement with respect to part of the property (*Wiggins* v. *Hummel,* 295 Fed. 510 at 511).

There are many different kinds of receivers. There are receivers appointed out of court by public officials and there are receivers appointed by courts. There are receivers *pendente lite* and receivers after judgment; common law receivers and statutory receivers; provisional receivers and ancillary receivers; temporary or interim receivers; permanent receivers, special receivers, general receivers, sequestration receivers, foreclosure receivers, operating receivers, administration receivers, active and passive receivers and others.

In Clark on Receivers, volume 1, second edition, at page 24, under the subject of "Special Receiver," the author says:

> By a special receiver is generally meant a receiver appointed in a suit to foreclose a mortgage on a particular parcel of property. Generally to conserve the

mortgaged property the decree of foreclosure affects only the property foreclosed and not all the property of the defendant. Such a suit is not for the purpose of making an equitable distribution of all the assets of the defendant among all of his creditors. The purpose of the receivership is to conserve the mortgaged property while the suit is in progress.

The same author, in the same volume, at page 25, under the heading of "General Receiver," says the following:

> The term general receiver is usually applied to a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy any judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver. General receivers are of a permanent character, and in the case of a corporation the purpose and object of their appointment is not only to adjust and pay the claims of creditors but also to distribute the surplus to stockholders.

In the case of *Schmidtman* v. *Atlantic Phosphate and Oil Corporation,* 230 Fed. 769 at 770-1-2, decided in 1916 by the United States circuit court of appeals for the second circuit, there was a question before the court which involved the distinction between special receivers and general receivers. The Phosphate Corporation was organized under the laws of New York. Its real estate was mortgaged for a large sum of money. A general creditor filed a bill against it alleging insolvency and receivers were appointed. Claims of creditors were advertised for, filed and proved. Then a suit was started to foreclose on the real estate and the appointment of a receiver was demanded in that case. The two cases were consolidated and the receivership was extended so as to include both. The mortgaged property was sold and the question arose as to whether debts due to laborers could be paid out of the proceeds arising from the foreclosure sale before distribution

on the bonds and coupons secured by the mortgage, there being a statute in the state of New York providing that upon the appointment of a receiver for a corporation the wages of employees should be preferred. The trial court decided in favor of paying the wages as preferred claims. The court of appeals reversed the trial court. The court of appeals stated that there was no satisfactory state court construction of the statute and that for that reason the circuit court of appeals was forced to construe the act. The circuit court of appeals held that the words "upon the appointment of a receiver of a corporation," as found in the statute, must mean the appointment of a receiver of the whole property of the corporation. The court further stated: "Certainly the section was not intended to apply where the foreclosure of a mortgage on a single parcel of real estate, owned by a corporation, brought about the appointment of a receiver in mortgage foreclosure. In the case at bar, general receivers were first appointed. The mere circumstance that when foreclosure proceedings were instituted the same persons were appointed receivers therein makes no difference."

Another thought: If foreclosure proceedings in the state court were to be carried to a conclusion and a given amount were found to be due, the defendant could pay that amount and have the receiver discharged and the foreclosure suit dismissed. If a general equity receiver had been appointed for the debtor, on the complaint of some creditor, and an equity receivership were pending, the defendant couldn't go into court and pay any amount found to be due to the complainant and thereby cause the receiver to be discharged and the suit to be dismissed. A foreclosure proceeding is a special proceeding *in rem*, as we have heretofore pointed out, and the jurisdiction of the court is confined to the terms of the trust deed. The receivership in such a case is special. A foreclosure proceeding is not a

class suit. On the other hand, an equity receivership is a class suit just as a bankruptcy proceeding is a class suit, and the defendant in such a class suit can not defeat the suit and the receivership by a settlement with the complaining party or parties. A special receivership under a foreclosure is for the benefit of the parties to the contract. An equity receivership involves the corporation itself and is for the benefit of all of the parties in interest in its affairs.

In a special receivership, such as a foreclosure, carried on under the terms of a contract and for the benefit of the parties in interest therein, creditors of a defendant corporation are not entitled to file general claims and, as a rule, are not interested in the proceedings. On the other hand, where a corporation is in an equity receivership, all of its property is involved, and all creditors, and even stockholders, are interested, and all are entitled to be heard and may assert their rights under such claims as they may have. On reason, the conclusion seems to be inevitable that by using the phrase, a prior equity receivership pending, Congress is bound to have had in mind a general equity receivership involving both the corporation and all of its assets. In such a proceeding, those who have special claims are always allowed to assert them.

The subject we are dealing with here is the interpretation of the language of the act, and it must be conceded that that interpretation must arise out of the act itself and that the language in question can not have one meaning in one case and another meaning in another.

There are so many reasons and so many authorities for the interpretation of "a prior equity receivership" in accordance with our contentions, that the task of enumerating all of them is almost, if not quite, impossible. The bankruptcy act itself, and particularly section 77B, seems to

carry that interpretation all the way through. In subdivision (a) of 77B, we find this further language which seems to have a direct bearing on the point, namely:

> If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have, had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature.

The above language describes the kind of exclusive jurisdiction that the court shall have under 77B on the approval of the petition or answer under the provisions of the bankruptcy act, and that jurisdiction is as full and as complete as a general equity receivership over all of the property of the debtor. If there were a prior equity receivership pending, meaning a general equity receivership with jurisdiction over all of the debtor's property, it would be foolish to give the bankruptcy court, under 77B, any less jurisdiction than a court of equity would have in a general receivership. This not only helps to explain what is meant by a prior equity receivership, but, to our mind, it excludes the possibility of giving the phrase any other meaning than that of a general equity receivership over the entire property of the debtor.

Taking the language which we have just quoted, as describing the exclusive jurisdiction of the bankruptcy court under 77B, how would it sound and how would it seem if we were to change the language to read as follows: —"shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have, had it appointed a receiver in a foreclosure case for a portion of

the property of the debtor". Such a substitution of language would make the jurisdiction under 77B a restricted one and would be utterly ridiculous. It would nullify the jurisdiction of the bankruptcy court, because a receivership in a foreclosure proceeding is restricted to certain property and is contractual. To restrict the jurisdiction of the bankruptcy court in any such manner would be to destroy its usefulness. It necessarily follows that the phrase, "if a prior equity receivership is not pending", which comes later in 77B than the language upon which we have just commented, means a general equity receivership wherein the court has jurisdiction over the corporation and all of its property for the purpose of protecting the rights of all parties in interest, and not for the purpose of enforcing specific contractual liens.

In subdivision (a) of 77B there is a provision for taking charge of the affairs of a subsidiary corporation when certain facts exist and when such subsidiary corporation has filed a petition or an answer in the same proceeding in which the holding corporation is involved, the final language of the provision being as follows: "and thereupon such court, if it approves such petition, shall have the same jurisdiction with respect to such corporation, its property and its creditors and stockholders as the court has with respect to such other debtor", such other debtor being the parent or holding corporation. The meaning of this language evidently is that the bankruptcy court, under 77B, shall have full general equity jurisdiction over the subsidiary corporation, the same as over the parent corporation, with the added advantages of the bankruptcy act. No other possible meaning can be got out of the language, and it is our contention that this is helpful in determining what is meant by a prior equity receivership pending.

In (10) of (b) of 77B, we find this provision:

For all purposes of this section, unsecured claims

> which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a federal court on the day of the approval of the petition or answer under this section, shall be entitled to such priority, and the holders of such claims, and other claims, if any, of equal rank, shall be treated as a separate class of creditors.

In the above language, just quoted, what is the meaning of the phrase—"if a receiver in equity of the property of the debtor had been appointed by a federal court on the day of the approval of the petition or answer under this section"? Obviously, the reference is not to a foreclosure proceeding or any other proceeding where there might be a special contractual receivership. The provision, as made in the above quotation, is for the purpose of taking care of unsecured claims which might be entitled to priority over existing mortgages. In a foreclosure proceeding, creditors generally are not allowed to file claims, even though there be a receivership, but in a general equity receivership for a corporation and its property, creditors are allowed to file claims, and such claims may be classified according to priorities. It necessarily follows that the reference is to a general equity receivership.

Also in (10) of (b) of 77B we find the following:

> In case an executory contract or unexpired lease of real estate shall be rejected pursuant to the direction of the judge given in a proceeding instituted under this section or shall have been rejected by a trustee or a receiver in bankruptcy or a receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor.

The question arises as to what is meant by "receiver in equity", as used in the above language. The very obvious answer is that a general receiver in equity having charge of the debtor and its property is meant. No other meaning

is possible. It would be foolish to claim that a foreclosure receiver was meant, because the jurisdiction of the court, even though a court of equity, in a foreclosure proceeding, is limited to the contractual rights of the parties, and general creditors, whether holding claims under leases or otherwise, would not have any right to be heard.

If, in each of these instances, as above referred to, we were to substitute "receiver in foreclosure" or some such language, instead of the language contained in 77B, the absurdity of the whole contention that a foreclosure receivership is the equivalent of an equity receivership would at once be apparent. Yet, if a foreclosure receivership is an equity receivership, as contended for by some, such a substitution would be legitimate. The point is really a simple matter when understood and rightly considered. A foreclosure receivership is special and limited and in such a receivership the court does not have jurisdiction generally over the debtor or over its stockholders or over its creditors and can touch no property except that which is involved under the contract. In a general equity receivership, on the other hand, the court has jurisdiction over the debtor and over its property and claims of creditors and all parties in interest.

In (2) of (c) of 77B, we find the following with reference to what the court shall have power to do upon the approval of the petition or answer, in addition to the jurisdiction and powers elsewhere conferred by the section, as follows:

> Shall fix the amount of the bond of every such trustee, and every such trustee, upon filing such bond, shall have all the title and shall exercise subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to section 44 of this act, and, if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, etc.

How foolish the above language would become if we were to substitute for "the same powers as those exercised by a receiver in equity" the following: "the same powers as those exercised by a receiver in a foreclosure proceeding"!

Interpretation of Statutory Language.

The meaning of an act of Congress is to be determined from the language used therein, and not from the debates in Congress or from any extrinsic source.

In *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; 41 Law Ed. 1007, at 1020, in an opinion by Mr. Justice Peckham, where the act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", was under consideration, the court said:

> Looking simply at the history of the bill from the time it was introduced in the senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein.
>
> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union P. R. Co.,* 91 U. S. 72, 79 (23: 224, 228); *Aldridge* v. *Williams,* 44 U. S. 3 How. 9-24 (11: 469-475), Taney, Ch. J.; *Mitchell* v. *Great Works Milling & Mfg. Co.,* 2 Story, 648, 653; *Reg.* v. *Hartford College,* L. R. 3 A. B. Div. 693, 707.
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by

> the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

The rule announced in the above opinion has been followed in many subsequent cases, among them being:

Duplex Printing Company v. *Deering,* 254 U. S. 474; 65 Law Ed. 360; 16 A. L. R. 196.

United States v. *St. Paul M. and M. R. Co.,* 247 U. S. 318, 62 Law Ed. 1134.

Cassarello v. *United States,* 271 Fed. 489.

United States v. *United Shoe Machinery Co.,* 264 Fed. 138 at 175.

In re *Kligerman,* 253 Fed. 781.

B. & O. R. Co. v. *Western Union T. Co.,* 241 Fed. 170.

United States v. *United Shoe Machinery Co.,* 234 Fed. 146 (refusing to consider records of debates in Congress in construing Clayton act).

It is no doubt true that resort may be had to the history of the times when an act was passed with the purpose in mind of getting at its general intent. In the instant controversy, no such resort is necessary for the reason that sections 77A and 77B carry their own excuse for existence in that behalf because the additional jurisdiction conferred by 77A, according to the very language of the act, is "for the relief of debtors, as provided in section 77B," and that means corporate debtors. If every sort of special receivership, custodianship, or guardianship, where the court has a special jurisdiction as to certain property, is to be construed as a prior equity receivership pending, then the purpose of 77A and 77B may be changed, through inter-

pretation, from that of relieving corporate debtors in distress to that of harassing them.

Further Consideration of Subdivision (i) of 77B as Bearing Upon the Meaning of "A Prior Receivership Pending".

We wish now to give some further consideration to subdivision (i) as being very helpful in determining what is meant by "a prior equity receivership pending" as used in subdivision (a). Subdivision (i) is in part as follows:

> If a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved the trustee or trustees appointed under this section, or the debtor, if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a federal or state or territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8) of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder.

As we view this language in subdivision (i), read in connection with other parts of 77B, to which we have called attention, it seems to preclude the possibility of any interpretation being given to "a prior equity receivership pending" other than that of a general equity receivership involving not only the debtor but all of its property also.

It is to be noted that the opening language of subdivision (i) is that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by federal, state or territorial court" etc., and that in that language the use of the phrase, "a prior equity receivership pending", is avoided. The language of subdivision (i) is, and the meaning is, that if a receiver or trustee has been appointed for all or any part of the *property of a corporation,* then and under those circumstances proceedings under 77B may nevertheless be had, as provided in subdivision (a), and such property, whether all or part, of the corporation in a prior receivership or trusteeship shall be turned over to the trustee or the debtor, as the case may be, under 77B, and the court, under 77B, shall have the power to protect obligations incurred by the prior receiver or trustee who has had possession of part or all of the property of the debtor. The further provision is that the court under 77B, if the proceedings under 77B shall be dismissed, shall have the power to turn the property back to the prior receiver or trustee on such terms as may be just. In other words, the provisions of 77B take notice of the fact that a part or all of the property of a corporation (not the corporation) may be in the hands of a special receivership, and the point is that such a situation shall not preclude the possibility of proceedings under 77B. Proceedings under 77B may be had just the same, if the terms of subdivision (a) as to allegations of jurisdictional facts are complied with, but not otherwise. It is apparent that the language of subdivision (i) deals with special receiver-

ships for a part or all of the property of the corporation, and, by reference to subdivision (a), also deals with general equity receiverships. We submit that it is impossible to get any other meaning out of subdivision (i) which is reasonable and which can be said to be consistent with the other provisions of 77B; subdivision (i) being *administrative.*

If the construction for which we contend is given to subdivision (i) and to other subdivisions to which we have referred, then the whole of section 77B, so far as the meaning of "a prior equity receivership pending" is concerned, is harmonious.

We called attention to subdivision (i) as throwing a very important light upon the interpretation of "a prior proceeding in bankruptcy or equity receivership * * * pending" as found in subdivision (a). In order to get the full benefit of subdivision (i) in this behalf it is necessary to read substantially all of (i). That done, it is at once apparent that the provisions of subdivision (i) are *administrative* in their nature while the provisions in subdivision (a), to which we have referred, are *jurisdictional,* and subdivision (i) specifically provides that petitions or answers are to be filed under section 77B as provided in subdivision (a). When these two subdivisions are read together, it is apparent that the meaning of subdivision (i) is just what we have said it was.

If there is a prior proceeding in bankruptcy pending, that presupposes an act of bankruptcy of some kind, and it means that the corporation and all its assets are under the jurisdiction of the bankruptcy court where everybody in interest has a right to be heard and a right to assert his claim if he has any. There being a prior proceeding in bankruptcy pending, a petition or an answer may be filed under 77B as provided in subdivision (a). If there is no

prior proceeding in bankruptcy pending and there is a prior equity receivership pending, then a petition may be filed in accordance with the provisions of subdivision (a). The provision with reference to "a prior equity receivership pending" constitutes an enlargement of the acts of bankruptcy but only for purposes of 77B. The fifth act of bankruptcy, as found in section 3 of the act, reads in part as follows: "or while insolvent, a receiver or a trustee has been appointed, or put in charge of his property." That means a receiver in charge of all of the bankrupt's property, the bankrupt being insolvent, while the provision in subdivision (a) doesn't say anything about insolvency in connection with the appointment of a receiver. It is evident that the language in subdivision (a) and the language as to the fifth act of bankruptcy both refer to the same kind of receiver, the former being broader in a sense than the latter, and, as heretofore pointed out, the kind of receiver referred to in the fifth act of bankruptcy is not one appointed for a special purpose, but the receivership contemplated is of a general nature, and the law is settled on that point, according to the cases which we have cited.

On May 8, 1935, the United States district court for the southern district of New York, in the case of *In re 2168 Broadway Corporation, Alleged Debtor,* (C. C. H., par. 3448) decided this very point as to the meaning of a prior equity receivership pending, and we quote the opinion as follows:

> A receivership that is merely incidental to the foreclosure of a mortgage upon real estate of a corporate debtor that is unable to meet its debts as they mature, is not of the quality of the "equity receivership," which, under the provisions of subdivision (a) of section 77B of the bankruptcy statute, and in the absence of an act of bankruptcy, will confer upon creditors of such debtor a right to subject it and its property to the jurisdiction of this court. See *In the matter of Laclede Gas Light Company,* United States District

Court, Eastern District of Missouri, June 26, 1934; *Standard Accident Insurance Company* v. *E. T. Sheftall & Company*, 53 F. (2d) 40; and *Schmidtman* v. *Atlantic Phosphate & Oil Corporation*, 230 F. 769, 771.

In my opinion, the "equity receivership" contemplated by section 77B is of much wider scope than that which frequently accompanies foreclosure proceedings; for example, a general receivership, or one such as characterized the so-called "conservation suits," with which all of us are familiar. These suits usually resulted in the reorganization of a corporate debtor, or the pro rata distribution of its assets among its creditors. I am aware, of course, that the United States District Court for the Eastern District of Illinois in the matter of *Flamingo Hotel Company*, decided August 9, 1934, and in the case of *Surf Building Corporation*, decided October 13, 1934, entertains a contrary view. But, I cannot agree therewith. Adjudications dealing with section 3 (a) subdivision 5 of the bankruptcy act, and which long antedate the enactment of 77B, hold that an appointment of a receiver or trustee of the property of an alleged bankrupt, in order to constitute an act of bankruptcy, relates to such an appointment in the course of a general receivership, and not to one for specifically described property, and which occurs in the progress of the ordinary foreclosure action. I see no occasion to infer that congress, in enacting 77B, intended that a foreclosure receivership of a specific piece of real estate, even though it may constitute the debtor's only asset, should be comprehended by the words, "equity receivership" as they are used in the statute under consideration. Had the national legislature wished to include foreclosure receiverships within the descriptive words it saw fit to employ, I think the language would have been more explicit. In construing the words "equity receivership" as employed in 77B, it is necessary to take note of the fact that apparently they are used in apposition to the phrase "a prior proceeding in bankruptcy," which proceeding, of course, looks forward to the ratable distribution of a bankrupt's assets among its creditors. Such is not the necessary or usual objective of a foreclosure receivership. Its primary purpose is to protect a mortgagee whilst he completes the formalities of the foreclosure of his lien. The mortgagor's

unsecured creditors cannot participate either in the mortgaged security, or in its avails, until the lien holder is fully satisfied. Equity receiverships, on the other hand, as customarily administered in the federal courts, took on many of the habiliments of bankruptcy proceedings. Often they were a substitute, if not a subterfuge, for bankruptcies, and, in one form or another, finally wound up the affairs of the defendant corporation. Hence, I conclude that the foreclosure receivership on which petitioners rely, is not sufficient to enable the alleged debtor to be subjected to the provisions of 77B of the bankruptcy act, and the petition to that end will be dismissed.

With respect to petitioners' argument that the answer herein supplies any deficiency that may exist in the petition, it is necessary only to say that the attorney filing the answer has indicated his wish to withdraw the same, and further that it, too, is under attack by an alleged officer and director of the debtor. Under these circumstances, I think too much reliance should not be placed thereon.

The above decision was affirmed on July 15, 1935, by the Court of Appeals for the 2nd Circuit, in an opinion, (not yet officially reported to our knowledge), which opinion is set out in the Appendix hereto attached, together with the opinion of the Court of Appeals in the instant case and the opinion of the Court of Appeals for the Second Circuit in the case of *Broadway-Barclay Corporation*.

Under date of June 3, 1935, in the case of *In Re Draco Realty Corporation*, United States district court, southern district of New York, the question of a prior equity receivership pending was raised and passed upon favorably to the contentions which we here make (C. C. H. Para. 3492). The court had this to say:

Passing on to the consideration of the question whether a prior equity receivership proceeding is pending, notwithstanding the determination made in other districts in such cases as *In re Granada Hotel*, 9 Fed. 09 (see Para. 3416, 3488); *In re Surf Building Corp.* ee Para. 3076); *In re Flamingo Hotel* (see Para.

3007); and in this District, *In re Broadway-Barclay Corp.* (decided April 12, 1935, no opinion, Clerk's file No. 61329). I entertain an opinion *contra*.

The language of the Statute, "if a prior proceeding in bankruptcy or equity receivership," to my mind, contemplates something more than a receivership in an action to foreclose a mortgage upon a single or separate property of a debtor, who may have a diversity of assets and be willing to lose a property not regarded as a profitable investment where no deficiency judgment is entailed.

As Senior Judge Knox said, *In re 2168 Broadway Corp.* (See Para. 3448):

"In construing the words 'equity receivership' as employed in 77B, it is necessary to take note of the fact that apparently they are used in apposition to the phrase 'a prior proceeding in bankruptcy' which proceeding, of course, looks forward to the ratable distribution of a bankrupt's assets among its creditors. Such is not the necessary or usual objective of a foreclosure receivership."

In the instant case, if the property in question were sold under judgment of foreclosure, there would be no recovery against the Draco Realty Corp., which would still own the realty and chattels, unencumbered by said trust mortgage, not legally applicable to the claim of the petitioners, except in the event of the approval of this petition, which is not warranted upon the fact shown, and the petition is dismissed.

Under subdivision (5) of section (3) of the bankruptcy act, defining acts of bankruptcy, an act of bankruptcy is committed by the appointment of a receiver or trustee for an insolvent person (*Standard Accident Insurance Company* v. *Sheftall and Company*, 53 Fed. (2nd) 40), but that act of bankruptcy, like other acts of bankruptcy, as described in section (3), would have to occur within the four months period preceding the filing of the bankruptcy petition, while, under the provisions of 77B, it seems that the four months limitation, as to a prior equity receivership pending, is removed. We call attention to this distinction with the thought in mind that it may be helpful if any question in this behalf should be raised.

In this *Granada Hotel Corporation* case and also in the *Flamingo Hotel Company* case and in the *Surf Building Corporation* case, decided in the district court for the northern district of Illinois, the opinions were all by the same district judge and are all substantially the same insofar as they relate to the question of whether a foreclosure receivership is a prior equity receivership pending within the meaning of 77B.

Because of the *jurisdictional importance* of this question of a prior equity receivership pending, we have tried to cover it as thoroughly as possible, and we respectfully submit that certiorari should be granted and that this honorable court should settle this jurisdictional question.

Respectfully submitted,

GEORGE T. BUCKINGHAM,
DON KENNETH JONES,
VINCENT O'BRIEN,

APPENDIX.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

In the Matter of
Granada Hotel Corporation,
Debtor.

C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as Members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933, etc.,
Appellants.

vs.

Sam Harris, J. Rose and I. Gordon,
Petitioning Creditors.
Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.
Honorable
Walter C. Lindley,
Judge.

Per Curiam:

Concededly there is but one question in this case, and that is whether or not at the time of the filing of the petition under Section 77B of the Bankruptcy Act there was a prior proceeding in equity receivership pending. The record shows, that prior to the filing of this petition, a bill to foreclose had been filed in the State Court by a second mortgagee under which a receiver had been appointed. While that case was pending, the trustee named in the first mortgage appeared in the State Court, and asked that Court to enter an order directing its receiver to report to the trustee, and turn over to it the possession of the mortgaged property. The State Court entered the order, but the foreclosure cases was still pending before the Master at the time of the filing of the petition herein, and jurisdiction over the property and the trustee remained with that Court. This showing was sufficient to sustain the jurisdiction of the Bankruptcy Court under Section 77B, Clark on Receivers, Secs. 12, 13, 14, and 963, and the District Court so held.

The order of the District Court sustaining the petition is therefore affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

In the Matter of
2168 Broadway Corporation,
Alleged Debtor,
Duparquet, Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc.,
Appellants.

Before: MANTON, SWAN and AUGUSTUS N. HAND, *Circuit Judges.*

Appeal from the District Court of the United States for the Southern District of New York.

Three creditors of 2168 Broadway Corporation filed a petition under 77B of the Bankruptcy Act (11 U. S. C. A. sec. 207) alleging that receivers had been appointed in a mortgage foreclosure action brought against the said corporation. From an order granting the motion of other creditors to dismiss the petition as insufficient on its face, the petitioners have appealed. Order affirmed.

Harper & Matthews, Attorneys for Appellant; Mark M. Horblit and Harold Harper, of Counsel.

Daniel A. Shirk and Milton A. Goldiner, Attorneys for Appelees; Edwin R. Wolf and Daniel A. Shirk, of Counsel.

SWAN, *Circuit Judge:*

It is provided by section 77B (a) that three or more creditors who have provable claims against a corporation aggregating $1,000 or more in excess of the value of securities, may file "a petition stating that such corporation is insolvent or unable to meet its debts as they mature, and if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months," and that such creditors propose that it shall effect a reorganization. Subdivision (i) further provides:

"If a receiver or trustee of all or any part of the

property of a corporation has been appointed by a Federal, State or Territorial court * * * a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section * * *"

The appellants are three creditors of 2168 Broadway Corporation, a New York corporation which holds the title to premises known as 2166-2168 Broadway. They filed a petition for the reorganization of their debtor, alleging that receivers had been appointed in an action commenced in the state court to foreclose a mortgage upon the debtor's property and that such receivers were in possession of its only property and administering the income therefrom for the benefit of the plaintiff in said action. Upon motion of other creditors of the debtor corporation the district court dismissed the petition on the ground that a mortgage foreclosure suit in which receivers have been appointed, is not an "equity receivership" within the meaning of section 77B. The correctness of this construction is the sole question presented.

Because the statute is of so recent enactment there has been as yet but little expression of judicial opinion on this important question. In three cases arising in the eastern district of Illinois, Judge Lindley held a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" for the purposes of section 77B. *In re Flamingo Hotel Co.* (August 9, 1934, not officially reported); *In re Surf Building Corp.* (October 17, 1934, not officially reported; *In re Granada Hotel Corp.*, 9 F. Supp. 909. The case last cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit in a short *per curiam* opinion, handed down June 5, 1935, which has not yet appeared in the reports. Opposed to these decisions is the opinion of Judge Knox in the case at bar, a decision by Judge Hulbert in *In re Draco Realty Corp.* (S. D. N. Y., June 3, 1935, not officially reported), and a dictum by Judge Faris in *In re Laclede Gas Light Co.* (E. D. Mo., June 26, 1934, not officially reported). See also 48 Harv. L. Rev. 39, 54, note 57.

The appellants argue that the words "equity receivership" are too clear to admit of construction and that custody of the property of a corporation by a receiver appointed in the exercise of chancery powers in any suit in equity must necessarily satisfy the requirements of the

statute. It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity. See Carmody's N. Y. Practice (2nd ed.), Vol. 8, sec. 1023; *Gordon* v. *Washington,* 294 U. S. ..... (Apr. 1, 1935). Nevertheless, it by no means follows that that is the type of suit Congress had in mind when it used the words in question. It would be strange indeed to call such a suit an "equity receivership"; so far as we are aware, a foreclosure action is never so referred to. The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver. The end sought by such a suit is the liquidation of the assets and their equitable distribution among creditors (*Gordon* v. *Washington, supra*) although in rare instances successful administration in receivership may restore to the corporation the ability to meet its debts in due course and the right to repossess its assets. The hope of saving the business is the impelling motive for such an equity receivership, as is indicated by the name "conservation suit," by which it is sometimes called. In our opinion it was a receivership of this general type, initiated by suit by a general credtor or a stockholder of the corporation, which Congress had in mind. Compare *Bryan V. Welch,* 74 F. (2d) 964 (C. C. A. 10). We do not think it was intended that the appointment of a receiver in foreclosure who takes possession of a specific piece of property for the sole benefit of the lien holder should serve as the basis of involuntary reorganization proceeds.

It is urged that this kind of equity receivership originated in the eastern part of the country and has not been used generally throughout the nation, except as to railroad corporations; that to construe the words as we have indicated is to ascribe to them a colloquial meaning contrary to well recognized canons of statutory construction. But the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate the legislators were thoroughly familiar with this type of receivership.

See 78 Cong. Rec. 7590, 7905-7. Moreover, the words are used in apposition to "a prior proceeding in bankruptcy." If either a proceeding in bankruptcy or an equity receivership is pending, it is unnecessary to allege that the corporation has committed an act of bankruptcy within four months. The appointment of a receiver in foreclosure proceedings is not an act of bankruptcy. See *Standard Accident Ins. Co.* v. *E. T. Sheftall & Co.*, 53 F. (2d) 40, 41 (C. C. A. 4). The canon of *ejusdem generis* is applicable. Bankruptcy looks to a liquidation of assets and an equitable distribution among creditors. So also does an equity receivership in a "conservation suit." When Congress enacted 77B, a distressingly large number of corporations had already been, or were in danger of being, placed in bankruptcy or equity receivership of the type described. It was seen that immediate liquidation of the assets would result in economic waste and unnecessary loss to creditors and stockholders. The purpose of the legislation was to supersede proceedings looking to liquidation by proceedings, looking to reorganization if there was an honest prospect that a plan fair to all interests could be devised to save the business. The benefits of the plan could be sought voluntarily by the debtor corporation, or they could be obtained upon an involuntary petition filed by creditors under the conditions specified. Reading the language in the setting in which it is used and in the light of the purpose of the legislation, we cannot think that Congress intended to give three creditors having claims totaling as little as $1000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization. In the case at bar the mortgage covered all the debtor's property but the logic of the appellants' position, as they concede, compels them to argue for the same result however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true, refers to the appointment of a receiver of all or any part of the property of a corporation. This, we think, contemplates a

situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings. In our opinion the district court correctly construed the statutes. Accordingly the order is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

In the Mater of
The Petition of Robin P. Allen, Francis M. Allen and Genevieve D. Allen,
Petitioners-Appellees.
For the Reorganization of
Broadway-Barclay Corporation,
Debtor-Appellant.

Before: MANTON, SWAN and AUGUSTUS N. HAND, *Circuit Judges.*

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal by Broadway-Barclay Corporation, debtor, from orders approving the petition of three creditors for reorganization of the debtor under section 77B of the Bankruptcy Act (11 U. S. C. A. sec. 207) and denying the debtor's motion to dismiss said petition. Orders reversed.

Glass & Lynch, Solicitors for Appellant; Joseph Glass and Leslie Kirsch, of Counsel.

Brown & Falkinburg, Solicitors for Appellees; James F. Donnelly and Samuel Michelman, of Counsel.

Samuel L. Chess, Solicitor for Minority Group of Bondholders.

Miller, Boston & Owen, Solicitors for Independent Bondholders' Committee; J. F. Gillis, Counsel.

SWAN, *Circuit Judge:*

Broadway-Barclay Corporation, hereafter called the debtor, is the owner of a large office and bank building lo-

cated in New York City. This property is subject to a mortgage securing $6,383,500 of bonds upon which the debtor became in default. In October, 1932, the trustee under the mortgage took possession of the building by agreement with the debtor and has ever since collected the rents thereof pursuant to said agreement. In March, 1934, the trustee began a foreclosure action in the state court. On January 3, 1935, three creditors of the debtor, each owning one of the debtor's $1,000 mortgage bonds, filed an involuntary petition for reorganization of the debtor under section 77B. They alleged no act of bankruptcy but rely upon the pendency of the foreclosure action, although no receiver has ever been appointed in said action and the mortgage trustee is in possession under the aforementioned agreement and without a court order. Without opinion the district court entered the orders appealed from.

This appeal raises a question similar to that decided in *In re 2168 Broadway Corporation,* handed down herewith, in which we have held that the appointment of a receiver in an action to foreclose a mortgage on the debtor's only property is not an "equity receivership" for the purpose of section 77B. That decision necessarily controls this. We may add, however, that even had a different conclusion been reached in that case, the orders in the case at bar would have to be reversed. We think it entirely clear that section 77B contemplates by a prior equity receivership a suit in which a receiver has already been appointed and not merely the commencement of a suit in which a receiver may be appointed. The well reasoned opinion of Judge Faris in *In re Laclede Gas Light Co.* (S. D. Mo., June 26, 1934, not officially reported) is in point. See also *In re Associated Gas & Electric Co.* (S. D. N. Y., Oct. 26, 1934, not officially reported). The orders are reversed with directions to dismiss the petition.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 429

IN THE MATTER OF
GRANADA HOTEL CORPORATION,
Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM, AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,
Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,
Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO PETITION FOR CERTIORARI; AND BRIEF IN SUPPORT THEREOF.

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IN THE

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IN THE MATTER OF
GRANADA HOTEL CORPORATION,
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C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM, AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,
Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,
Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

REPLY TO PETITION FOR CERTIORARI; AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Justices of the Supreme Court of the United States:

The reason relied on by the petitioners herein for the allowance of the Writ of Certiorari is the conflict of views in the interpretation of the term "equity receivership"

between the United States Circuit Court of Appeals for the Second Circuit in re 2169 Broadway Corporation, C. C. H. Par. 3546, July 15, 1935, and the United States Circuit Court of Appeals for the Seventh Circuit, in the case at bar. The court, in the former case, admitted that a mortgage foreclosure receiver may properly be called an equity receiver in the natural and obvious import of that term. It denied, however, that such a mortgage foreclosure receivership is an "equity receivership" within the meaning of Section 77B of the Bankruptcy Act. It asserted that Congress meant by "equity receivership" only the general receivership for liquidation which constitutes the fifth Act of bankruptcy under Section 3 of the bankruptcy law. Apart from the misconceptions of law upon which that decision is based, it would, if followed, have the most highly inconvenient consequences and might disastrously impair the jurisdiction of the Bankruptcy Court in cases of this character. For it would, in effect, make identical the conditions under which a creditors' petition will lie under Section 77B and the conditions under which an involuntary petition for adjudication in bankruptcy will lie against a corporation.

This insistence on the identity in the jurisdictional requirements of these two different kinds of remedy would seriously impair the highly remedial object of recent legislation for the relief of debtors. Where no other act of bankruptcy has been committed or where one has been committed more than four months before the filing of the petition it would be impossible, on this decision, for the creditors of an otherwise insolvent debtor to initiate proceedings under Section 77B even though all of the properties of the debtor were in mortgage foreclosure receivership. More specifically, it would deprive real estate bondholders whose liens are enforced by mortgage foreclosure proceed-

ings and through receiverships incidental thereto, of all possibility of relief by creditors' petition under Section 77B. These inconvenient results have been avoided by the decision of the Seventh Circuit Court of Appeals in the case at bar which recognized that a mortgage foreclosure receivership is an equity receivership and that as such, it provides the necessary jurisdictional facts for proceedings under Section 77B by creditors of real estate corporations against their insolvent debtors. Unless the decision in this case be followed, many thousands of petitions already filed by real estate creditors under Section 77B will necessarily be dismissed, many reorganizations of real estate corporations already consummated under Section 77B will be void and a condition of utter demoralization will be created in the real estate markets in the large metropolitan centers of this country. These and other legal grounds will be set forth in detail in the supporting brief.

Wherefore we respectfully submit that the petition for a Writ of Certiorari should not issue in this cause.

FRANK E. MCALLISTER,
MAURICE WALK,
Counsel for Respondents.

BRIEF.

STATEMENT OF THE CASE AND ISSUE.

A creditors' petition in this cause was filed against the Granada Hotel Corporation, debtor, in the District Court, alleging that a receiver had been appointed in the state court of the assets and property of the debtor. Upon the hearing it appeared that there was a foreclosure suit in the state court on a second mortgage upon the real estate and that a receiver had been appointed therein; that first mortgage proceedings had been started and were still pending through cross-bill filed in the second mortgage suit; and that, prior to the filing of the petition under 77B, the state court had ordered the receiver to place the first mortgage trustee in possession of the property. The trial court took the view that a foreclosure receivership was a "prior equity receivership pending" within the meaning of 77B, and that the discharge of the receiver and the placing of the trustee in possession, by orders of court, did not change the status. Upon appeal to the Circuit Court of Appeals, the judgment of the trial court was sustained.

The sole question raised by the petition for a writ of certiorari herein is whether a receivership of mortgaged property arising out of and in the course of foreclosure proceedings in equity, is an "equity receivership" within the meaning of Section 77B(a) of the Bankruptcy Act.

THE STATUTORY PROVISIONS.

The portions of 77B of the National Bankruptcy Act as amended that are material are as follows:

"(a) * * * Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over may, if such corporation has not filed a petition or answer under this section file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months, that such creditors propose that it shall effect a reorganization; and such corporation shall within ten days after the service of a copy of such petition upon it, answer such petition * * *.

(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section," * * *

ARGUMENT.

Section 77B(a) provides that three or more creditors having provable claims in excess of one thousand dollars ($1,000), may file a petition against a corporate debtor, stating that "such corporation is insolvent or unable to meet its debts as they mature, and if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an Act of Bankruptcy within four months." The question to be here considered is whether a receivership of mortgaged property, arising out of foreclosure proceedings in the state court, is a "prior equity receivership" within the meaning of Section 77B.

Petitioner has contended that the term "equity receivership" must be limited to a general receivership for the liquidation of the corporation. "As we understand an equity receivership, it is one where the affairs of the corporation may be wound up." (p. 4, petitioner's brief.) His argument appears to be that only in such general receiverships for liquidation is there a receivership of the debtor corporation personally, that only in such general receiverships is the corporation itself in receivership, and therefore that they constitute a unique class of equity receiverships, different from all others in being an independent and final equitable remedy.

We shall argue that the term "equity receivership" taken literally has a plain and unequivocable meaning; that this meaning refers to the inclusive, generic class of receiverships arising out of proceedings in courts of equity; and that there is nothing either in the statute itself or on principle that justifies or requires a substitution for this gen-

eral class, of a particular species of receivership comprising the general corporate receiverships for liquidation. We shall point out that the petitioner's case is based upon mistaken notions concerning the basic character of the equity receivership. We shall argue that 77B itself provides in sub. (i) its own definition of equity receivership for the purpose of filing a petition thereunder. And that this definition includes a receivership arising out of and in the course of mortgage foreclosure proceedings as in the case at bar. Not only, therefore, is there an equity receivership here on general principles of equity jurisprudence and statutory construction, but also on the explicit terms of the statute itself. Although some phases of the analysis of the general principles applicable to equity receivership have only an academic interest in view of the explicit provisions of sub. (i), a discussion of them has nevertheless been undertaken in order to clarify matters upon which the petitioner is under some fundamental misconceptions.

We shall pay particular attention to two main arguments in petitioner's brief. The first is that, since the only receivership which constitutes an act of bankruptcy is the appointment of a general receiver for liquidation, "equity receivership" under 77B should be interpreted by parity of reasoning as a general liquidating receiver. We shall deal with this argument under Point 5. We shall point out that Section 77B expressly makes any pending equity receivership a ground of jurisdiction *in the alternative* to the general equity receivership for liquidation which is one of the acts of bankruptcy under Section 3. Being an alternative ground of jurisdiction under 77B the meaning of the term "equity receivership" must necessarily be interpreted as having a different and wider extension than the term "general receivership for liquidation."

The second main argument in petitioner's brief (p. 3)

is an attempted *reductio ad absurdum.* Suppose, it is said, a corporate debtor owns a dozen hotels, only one of which is encumbered. The corporation might be perfectly solvent and able to pay its debts, and yet there might be a foreclosure proceeding and a receivership of the encumbered parcel. Will the creditors, we are asked triumphantly, be permitted to bring such a corporation into a bankruptcy court for reorganization under 77B? By no means. There is an equity receivership here of course, an equity receivership of part of the corporate property, though not an equity receivership of the corporation itself which, as we shall show under Point 4, sub. D, is a strictly meaningless conception. *But though there is an equity receivership in the supposed case, a petition under 77B could not lie because there can be no allegation of insolvency, or inability to pay debts as they mature, which is one of the prime jurisdictional allegations under 77 B* (a). Moreover in the instant case it is not denied and the record discloses that all of the assets of the corporation were in the custody of the receiver and thereafter in the custody of the trustee under the mortgage pursuant to order of Court in the foreclosure proceedings and that the corporate debtor was insolvent and unable to pay its debts. The hypothetical question of the petitioner is thus easily answered although the facts supposed are entirely irrelevant to the issues here presented. We shall deal more fully with this matter under Point 7, sub. A, and show that "equity receivership" when taken, as we contend it should be, in its literal and broad significance, involves no absurd or harsh consequences at all but that, on the contrary, it is the interpretation contended for by petitioner which would destroy any possibility of relief under Section 77B to large classes of real estate creditors and so lead to intolerable and unjust results.

I.

THE TERM "EQUITY RECEIVERSHIP" TAKEN LITERALLY HAS A NATURAL AND OBVIOUS IMPORT. IT REFERS TO THE GENERIC CLASS OF ALL RECEIVERSHIPS ARISING OUT OF AND IN THE COURSE OF EQUITY PROCEEDINGS AND CANNOT BE LIMITED TO ANY PARTICULAR SPECIES THEREOF.

A. *"Equity receivership" connotes the idea of custody and administration of a res by a court of equity through its duly constituted agents.*

The meaning of a general term has two aspects, its connotation and its denotation. Its connotation is the group of ideas that it signifies. Its denotation is a class of particular objects referred to. Looking at the term "equity receivership" from this approach it connotes the following ideas:

1. The proceeding in which the receiver is appointed must be an equity proceeding as distinguished from other than equity proceedings. That is, there must be some equitable right or some form of equitable relief being adjudicated in a court of chancery.

2. The receiver must be the representative of a court of chancery.

3. The property or fund must actually be in the custody of and in the course of administration by the duly constituted representative of the court. It is not enough that a receiver has been appointed. If he has not yet actually taken custody and started upon the functions of his office, there is an equity receiver, but not an equity receivership. The term "receivership" refers to the status or condition of the property or fund being administered by the receiver. It is thus possible for the property to be in the same receivership although there are successive receivers.

Transfer from one receiver to another occurred in the case at bar. The second receiver was the trustee under the first mortgage. It thus functioned in two capacities—(1) As trustee under the trust deed in which capacity its rights and powers were no greater and no different after the transfer than before; and (2) As arm or representative of the court in which capacity its powers were derived from the general equitable jurisdiction and judicial power of the court itself.

The order of the equity court in the foreclosure proceedings transferring custody to the trustee under the first mortgage did not therefore alter the status of the property as being in *custodia legis*. The property remained afterwards as before, in the custody of the court through its representative who happened to be also the trustee under one of the mortgages. As such a representative, the trustee took custody of the property not on its own motion or under its powers as trustee but under an order of the court, and it functioned thereafter not by authority derived from the private agreement of the parties as incorporated in the trust indenture but as an arm or hand of the court. Like any other receiver it was part of a judicial instrumentality and process for adjudicating the equitable rights of the parties before the court. Like other receivers it administered the property under the control and direction of the court, rendered its accounts, obtained leave to make expenditures, entered into leases and was subject in every other way to the same supervision in the details of its administration as other receivers. It retained custody at the pleasure and discretion of the court and could be divested of custody by the court's summary order. All the determining characteristics of the receivership are here present. There was custody of the property in the court through a judicial instrument and the administration of the property under

the supervision of the court pending the adjudication of the controversy. The mere fact that the court's representative was also functioning in some other capacity and has been referred to in these proceedings as the trustee rather than as the receiver, is of no material significance as the court below said in *re Granada Hotel Corporation,* 9 Fed. Supp. 909:

> "As is frequently observed, a receiver is a fiduciary of the court, appointed as an incident to other proceedings where certain ultimate relief is prayed. The trustee here, likewise, is a fiduciary of the state court and is acting under the orders, directions and control of that court. Words of themselves are unimportant. Whether the trustee be called a receiver, a guardian, a custodian, or by some other name, it remains, in its essence, a fiduciary in possession of property pending the outcome of foreclosure, holding under the court's order, incidentally to the ultimate purpose of the state proceedings. Consequently there is an equity receivership within the meaning of that term by Congress."

B. *The denotation of the term "Equity Receivership" is the class of all specific kinds of receiverships that can be created in a court of equity.*

It is elementary that general terms must be given a general construction. A general term will be given a restricted meaning only under exceptional circumstances, as when the general meaning would lead to injustice, oppression and absurd consequences or results so extraordinary or unjust that they cannot be deemed to have been within the legislative intent.

> "If the statute did not expressly name any kind of insurance, but used general words, then it would cover all kinds of insurance contracts, as the rule is well established that where a statute contains general words only such general words are to receive a general construction, and the effect of them is not to be limited

except by express words of the statute itself." *Mears Mining Co.* v. *Md. Casualty Co.*, 144 S. W. 887.

"Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto." *Tynan* v. *Walker*, 35 Cal. 634, 642.

"Since it is the duty of the courts to ascertain the meaning of the legislature from the language of the statute, general words are to have a general operation unless the manifest intention of the legislature affords grounds for qualifying or restraining them." 25 R. C. L. 970-1.

Where the general term has also a special and particular significance the general meaning must be preferred unless it leads to injustice, oppression or absurd consequences.

"The language of the statute should be taken in its general, instead of its particular, meaning unless a contrary intent clearly appears therefrom." *Abbott* v. *City of Milwaukee*, 134 N. W. 137.

Nothing in the provision under discussion here or in the act itself limits the generality of the term "equity receiverships." There is no reference in the statute to a "general corporate receivership," nor to a "receivership *of the corporation* itself." The argument of the petitioner is based largely upon the surreptitious assumption that the statute uses one of these expressions. But no such language is used in the statute from which it might be inferred that "equity receivership" must be limited to general receiverships for the liquidation and distribution of corporate assets, or to any other one species of receivership in equity. The only limiting requirement is that the receivership must arise out of proceedings in equity. No further qualification or limitation as to the kind of receivership or in respect of its purpose is expressed or implied. Nor is there any express or implied exclusion of any particular kind of receivership in equity,

such as a receivership arising out of mortgage foreclosure proceedings. The term comprises any and all situations which satisfy the conditions of being a receivership in equity. It refers to *all* receiverships in equity without discriminating between them.

The term "equity receivership" in the statute is a reference to a *kind* of legal arrangement or device through which property may be administered by a court of equity and not to any specific purpose for which such administration takes place. There are an indefinite number of such purposes corresponding, as we shall see, to the primary rights and remedies which are the subject matter of equity jurisdiction and in which the receivership device is used, and therefore an indefinite number of kinds of equity receiverships. When the statute speaks of "equity receivership," it is therefore speaking of a basic kind of legal arrangement, and not of one specific receivership in equity or one restricted class of equity receiverships. It refers to all receiverships in equity and to all legal situations in which that device is used.

A receivership arising out of equity proceedings to foreclose a mortgage is thus an "equity receivership" in this natural and obvious import of the term. It is thus one of the class denoted by the term "equity receivership." Another would be general liquidating receivership.

That this is the plain and natural import of the term is admitted in the leading case depended upon by the petitioners *in re 2168 Broadway Corporation.* C. C. H., Par. 3546, where the court said:

> "It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity and that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity.

II.

SINCE "EQUITY RECEIVERSHIP" TAKEN LITERALLY HAS A DEFINITE AND PRECISE MEANING, THERE IS NO AMBIGUITY AND NO OCCASION OR ROOM FOR INTERPRETATION.

A. *An ambiguity arises when a provision, taken literally, has no definite and precise meaning, or leads to absurd results.*

It is fundamental that courts will not resort to interpretation when the provision is not ambiguous. An ambiguity does not arise simply because it is possible by an elaborate and artificial process of reasoning and conjecture to suggest the bare possibility of a second meaning. Nor is it created by the existence of a colloquial meaning which diverges from the primary, legal meaning. The ambiguity must arise from the presence of two literal and equally valid interpretations of the term. In the case at bar we have shown the term "equity receivership" to have a definite and natural import. It is not rendered ambiguous by the suggestion that in another context and with the addition of other words such as "corporate" and "general" it might have a more restricted meaning. There is, therefore, no occasion and no propriety for embarking upon a process of judicial interpretation which in instances of this kind become an enterprise "in conjectures *aliunde*."

> "There must be an ambiguity in the language itself and not the mere possibility of a doubt or a conjecture about what it might mean, if it did not literally mean what it says."
>
> "*The possibility of a doubt is not sufficient.* It is out of such possibilities that controversies arise, and it is the duty of courts to ascertain by judicial interpretation, not whether a doubt may be asserted but whether any ambiguity really exists.
>
> When the words used have a definite and precise

meaning, it is not allowable to go beyond the statute in order to restrict or extend their meaning.

It is not allowable to interpret what has no need of interpretation, or *when the words have a definite and precise meaning to go elsewhere in search of conjecture in order* to restrict or extend the meaning.

Statutes and contracts should be read and understood according to the most natural and obvious import of their language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation."

Chicago Home for Girls v. *Carr*, 300 Ill. 478, 483. (Italics ours.)

"Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

Where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final meaning intended."

U. S. v. *Mo. Pac. R. R.*, 78 U. S. 269, 73 L. Ed. 322.

In the above cited cases the court could have avoided inconvenience and hardship by disregarding the primary and natural meaning of the words in favor of a strained and secondary meaning which was being urged upon it. This it refused to do. In our case no inconvenience or embarrassment results from accepting the provision in its plain, natural meaning, as referring to the general and inclusive class of all receiverships in equity. It is the limited and special meaning assumed by the petitioner which, as we shall show below, would be attended by serious, if not disastrous, consequences. When there is no inconvenience and hardship resulting from a plain rendering of the words, there is a *fortiori*, no excuse whatsoever for resorting to

construction for the very purpose of giving a forced, limited and exclusive meaning which will defeat the beneficent purposes of the act.

B. *An ambiguity occurs here only if it is deliberately created by rewriting the provision and adding words to the statute.*

Petitioner contends that "equity receivership" means general corporate receivership for liquidation or for some other purpose and excludes all other receiverships in equity. But this is possible only if we add the words "general" and "corporate", and also add words of exclusion directed against all other equity receiverships except general corporate receiverships. This procedure, of course, would violate all sound doctrine. It would deliberately create ambiguities where none existed before by undertaking to rewrite the statute. When a statute has a plain and natural meaning, courts cannot rewrite it even to avoid harsh consequences. When existing provisions taken literally lead to beneficial results, and when the proposed change itself would have disastrous consequences, any conceivable reason for laying violent hands upon the wording of the statute disappears.

To substitute "general receivership" for "equity receivership" would not only rewrite the provision, but would create further ambiguities and repugnancies with other sections of the statute, notably sub. (i) which, as we shall see, defines "equity receivership" for the purpose of filing a petition under 77B as meaning a receivership of *all or any* part of the corporate assets. Sub. (i) renders conclusive our above argument on general principles of interpretation, viz.: that the act does not refer to one special kind of receivership, but to any receivership where all or

any part of the debtor's property is in the custody and administration of a receiver or of a trustee in custody of the property under direction of a court of equity of an equity court without regard to the purpose of the receivership. We shall return to this in greater detail in our discussion of sub. (i) below.

C. *An ambiguity is created when a different and colloquial expression is substituted for the phrase "Equity Receivership".*

There is a colloquial expression which speaks of a "receiver of a corporation" or of a "corporation being in receivership," and this colloquialism refers to a general receiver for conservation of all the assets of a corporation, pending its reorganization or liquidation. It must be pointed out, however, that the statute nowhere uses such expressions. It does not speak anywhere of a receivership *of a corporation,* or of a corporation itself being in receivership, and we shall show moreover in due course that such expressions are strictly meaningless in the law. The statute speaks only of "equity receiverships," which, taken literally, is the inclusive designation of all receiverships in equity and is defined in sub. (i) of Section 77B as a receivership of all or any part of the debtor corporation's property. Petitioner, however, continually interpolates and insinuates this colloquialism whenever there is a reference to "equity receivership" and thus creates the impression that the statute actually speaks of a "receiver of the corporation." Thus (page 4 of his brief) when he puts an example of a perfectly solvent corporation only one of whose properties is in foreclosure receivership, he says: "Certainly, it could not be said, under such circumstances, that the corporation was in equity receivership." The question is not whether the corporation itself is in "equity receiver-

ship;" because no such requirement is stated in the statute and could, strictly speaking as we shall see, have no meaning if it were. No one contends that in the supposed case the corporation itself is in "equity receivership." Our contention is that in the supposed case there is an "equity receivership" as defined by the statute, even though, for lack of essential jurisdiction facts a petition under Section 77 (b) would not lie. We simply wish to observe at this point that petitioner, by means of such a colloquial expression begs the question by improperly substituting a colloquialism which has an entirely different meaning for the phrase actually used in the statute.

That a use of a colloquialism may lead even a court into error is shown in the case of *re* 2168 *Broadway Corporation,* C. C. H. 3546, upon which petitioner relies. Instead of consulting the literal meaning of "equity receivership," the court assumes that the statute refers to the colloquialism which speaks of the corporation itself being in receivership. Because the statute is about debtor corporations, the court simply assumes that "equity receivership" must have been intended to refer to a receivership of the corporation itself. Because of this mistaken assumption the court rejects the legal and literal meaning which it had set forth, in favor of a meaning used in "common parlance." It concludes that "equity receivership" must be confined to the so-called "conservation suits" which are brought "for the reorganization of the debtor or the pro rata distribution of its assets among its creditors," and in which the corporation, by answer, confesses the allegations of the bill and consents to the appointment of a receiver. Not only is this substitution of a colloquialism for the plain words of the statute indefensible from the point of view of the art of statutory interpretation, but the result arrived at by the court would

seriously impair jurisdiction to entertain petitions under 77B on the ground of pending "equity receivership." This follows from the decision by the United States Supreme Court in the case of *Shapiro* v. *Wilgus,* 287 U. S. 344, 77 L. Ed. 355, in which consent receiverships in such "conservation" suits have been condemned in strong language as collusive devices. It is questionable whether such suits can continue to be used hereafter. Surely, it is inexpedient in the highest degree to limit "equity receiverships" to such irregular and eccentric proceedings whose practical usefulness is seriously limited, if not completely destroyed by recent decisions. The court, in *re* 2168 *Broadway Corporation,* was obviously misled by the same uncritical assumption that we noted in the petitioner's argument. It mistakenly supposed, because Section 77B is a statute about corporations, that a reference to "equity receivership" was a reference to the colloquialism where the corporation itself is said to be "in receivership."

We shall deal fully with this colloquial expression under Point 4 sub. D and show that, strictly speaking, it is entirely devoid of any legal meaning whatsoever, because there is no such legal conception as a receivership of the corporation itself. At this point we desire only to point out the impropriety of ignoring an expression which has a literal and definite significance and substituting therefor a colloquialism, the effect of which is to *create* an ambiguity where none existed before and which will seriously, if not disastrously, restrict the court's jurisdiction in cases of this character.

POINT III.

ACCEPTANCE OF THE BROAD MEANING OF "EQUITY RECEIVERSHIP" AS INCLUDING MORTGAGE FORECLOSURE RECEIVERSHIP IS IN ACCORDANCE WITH THE RATIONAL WEIGHT OF AUTHORITY. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IS BASED UPON NUMEROUS MISCONCEPTIONS AND SHOULD NOT BE FOLLOWED.

In its opinion in this case, affirming decision of Lindley, J., this court said as follows:

> "Concededly there is but one question in this case, and that is whether or not at the time of the filing of the petition under Section 77B of the Bankruptcy Act there was a prior proceeding in equity receivership pending. The record shows, that prior to the filing of this petition, a bill to foreclose had been filed in the State Court by a second mortgage under which a receiver had been appointed. While that case was pending, the trustee named in the first mortgage appeared in the State Court, and asked that Court to enter an order directing its receiver to report to the trustee, and turn over to it the possession of the mortgaged property. The State Court entered the order, but the foreclosure case was still pending before the Master at the time of the filing of the petition herein, and jurisdiction over the property and the trustee remained with that Court. This showing was sufficient to sustain the jurisdiction of the Bankruptcy Court under Section 77B, Clark on Receivers, Secs. 12, 13, 14, and 963, and the District Court so held.
>
> The order of the District Court sustaining the petition is therefore affirmed."

After the decision of the 2nd Circuit Court of Appeals in *Re* 2168 *Broadway Corporation,* C. C. H. 3546, a petition for a rehearing was filed in the above case and was denied.

In *Matter of Surf Building Corporation,* (D. C., E. D. Ill. October, 1934, not officially reported) C. C. H. Bank-

ruptcy Law Service, Paragraph 3076, the court had refused to dismiss the petition of bondholders whose bonds were secured by a mortgage then in foreclosure, a state court receiver in the foreclosure suit having been in possession of the property for three years. The court said in part:

> "It may be well to comment upon one or two contentions submitted by the respondent. It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose: that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77-B, to limit jurisdiction under that section to equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

In C. C. H. Bankruptcy Law Service, Paragraph 3007, the reporter states that there was a similar holding by Judge Lindley in the case of *In re Flamingo Hotel Company*, decided August 9, 1934, which is not officially reported.

Certain remarks of the court in the case of *In re Laclede Gas Light Co.*, (U. S. D. C., E. D. Mo., June 26, 1934), C. C. H. Bankruptcy Law Service, Paragraph 3001, tend to the contrary of the three decisions cited above. The question, however, was not involved in the actual decision in that case, which was rendered less than three weeks after the approval of Section 77B. In that case a suit had been filed

to foreclose a mortgage, in which a receiver was prayed to take charge of the properties of the alleged debtor. But the receiver prayed for had not actually been appointed. While the court did say that a foreclosure receivership "is not strictly speaking an equity receivership," it was sufficient to the decision in that case that no equity receivership was pending since no receiver had actually been appointed. The court made it plain that this was the basis of its decision, saying (p. 1102):

> "If Congress had meant that the mere filing of an action wherein a receiver, as a mere incident, should be asked for, it would have said 'a proceeding for the appointment of a receiver.' It did not say this. There is not any doubt. I repeat, that, if Congress had meant a mere incidental request for the appointment of a receiver, it would have said so in plain and explicit words.
>
> Now, what would be the disturbing effect of such a construction as is here contended for by petitioner? It would leave open the road to file a proceeding like this at bar in every case where a corporation, though eminently solvent, was yet presently embarrassed for lack of cash. This, by merely filing a petition for a receiver, without any well-founded hope of having one appointed, and then by following up such petition by a petition as at bar. Congress could not have intended to leave open such a wide road to collusion and financial chaos and disaster if it had stopped to consider the dire legal consequences of its action, and it must be presumed that Congress did give these consequences full consideration."

The Laclede case simply holds that where all that happened was the filing of a suit requesting the appointment of a receiver, no receivership was "pending". It is a holding on the meaning of the term "pending" and not on the meaning of the term "equity receivership." This view of the Laclede case is confirmed by the Circuit Court of Appeals in *Re Broadway-Barclay Corporation*, C. C. H., Par. 3547, where the Laclede case was referred to as a suit

for the appointment of a receiver which had been commenced but where a receiver had not yet actually been appointed.

The case of *Brjan* v. *Welch*, 74 Fed. (2d) 964, is another authority cited by petitioner. There a receiver was appointed for all the corporate assets upon allegations of mismanagement and fraud by the corporate officers. The receivership was to continue until a suitable management had been established. It was held that this constituted an equity receivership and since the corporation was insolvent or unable to pay its debts, that a petition under 77B would lie. We have no quarrel whatsoever with this holding which is in exact accordance with our own views, but petitioner interprets this case as deciding that no other receivership but a general receivership for all the corporate assets is the proper interpretation of the term "equity receivership." The case itself gives no warrant for this restriction. It simply holds that a general equity receivership for temporarily operating the corporate business is an equity receivership. Therefore, says the petitioner, it holds that no other kind of receivership in equity is an "equity receivership." This is a rather elementary logical fallacy. It is like saying because "all Chicagoans are inhabitants of the United States" that "all inhabitants of the United States are Chicagoans" or that "no one is an inhabitant of the United States who is not a Chicagoan." Similarly from the holding that a general corporate receivership is an equity receivership, it does not follow that every equity receivership must be a general corporate receivership.

In re 2168 Broadway Corporation, C. C. H. 3546, has been cited by petitioner. In that case the petitioning creditors were holders of a second mortgage, while the first mortgage was in the hands of an individual who opposed

the proceedings for reorganization under 77B. Under such circumstances, a reorganization under 77B was hopeless from the outset. The petition, therefore, could have been disposed of under accepted principles as lacking in good faith. The court, however, rested its judgment on the issue of "equity receivership," denying that a mortgage foreclosure receivership was an "equity receivership" and contending that "equity receivership" under 77B means only general receiverships for liquidation or reorganization of corporations. We have already pointed out that the court erred in choosing a narrow and colloquial meaning for which there is no warrant in the statute itself, and ignoring the literal meaning of the words being interpreted.

The more important error committed by the court is its view that a mortgage foreclosure receivership cannot be an equity receivership because it is not an Act of Bankruptcy, only general liquidating receiverships being such. We shall argue this question in greater detail under Point V and shall show that the terms "equity receivership" and "Act of Bankruptcy" are plainly and expressly in a disjunctive relation and must be given effect as separate and distinct grounds of jurisdiction unless the term "equity receivership" is to be regarded as an entirely superfluous expression in the statute.

Moreover the court expressly approves of *Bryan* v. *Welsh*, 74 Fed. (2d) 964. But that case must be placed in definite opposition to the views of the court in *In re 2168 Broadway Corporation*, and to the language in *In re Laclede Gas*, C. C. H., par. 3001, and to *In re Draco Realty Corp.*, C. C. H., par. 3492, that only a general receivership for liquidation such as would constitute an Act of Bankruptcy is an "equity receivership" under 77B. In *Bryan* v. *Welch*, the receivership was not for the purpose of winding up the affairs of the corporation, but for temporarily

operating the business, and it was expressly directed by the court when the receiver was appointed, that the assets be turned over to the new corporate management when a suitable one would be established. *Although not for liquidation and not an Act of Bankruptcy, it was nevertheless held to be "a prior equity receivership" within the meaning of Section 77B.*

If *In re 2168 Broadway Corporation,* C. C. H. 3546, be followed, jurisdiction under Section 77B would be limited to situations where an Act of Bankruptcy had been committed. Surely it could not have been the intent of Congress to limit jurisdiction for the relief of debtors to the ordinary bankruptcy situations. The whole rationale of the recent legislation for the relief of debtors is to extend relief to situations hitherto not cognizable by bankruptcy courts. These recent acts are not statutes of liquidation but statutes of reorganization and the procedures provided therein should not be narrowly confined to situations where an Act of Bankruptcy has been committed. If they are so limited and if the authority of the Circuit Court of Appeals in the case at bar is rejected in favor of *In re 2168 Broadway Corporation,* C. C. H., Par. 3546, then the curative processes of Section 77B will be most seriously impaired. Debtor and creditor would have to wait until the debtor has been reduced to committing an Act of Bankruptcy before they are eligible for relief.

IV.

THE CONTENTION THAT "EQUITY RECEIVERSHIP" MEANS "GENERAL CORPORATE RECEIVERSHIP" RESTS ON THE MISCONCEPTION THAT A GENERAL CORPORATE RECEIVERSHIP IS AN INDEPENDENT FORM OF EQUITY JURISDICTION, AND ON THE MISTAKEN NOTION THAT IT IS A RECEIVERSHIP OF THE CORPORATE PERSON.

Petitioner's contention that "equity receivership" must be restricted to "general receivership for the assets of the corporation" is based upon the belief that such a general receivership is a unique and exceptional form of receivership in equity. This belief is based upon two grounds, one of which is expressly advanced and the other implied. The one expressly formulated is that only the general corporate receivership is the receivership of a corporation *personally*, whereas the other receiverships in equity attach only to the property or fund. The one implied is that the general corporate receivership is an independent and ultimate form of equitable remedy. It is asserted by implication that there is a form of equitable relief and jurisdiction described as the appointment of a general receiver for the corporation, where the sole prayer for relief is the appointment of a general receiver. Even if these two arguments were valid and the general receivership were proved to be a peculiar and exceptional form of receivership it would not follow by any means, for reasons previously mentioned, that the inclusive and generic term "equity receivership" as used in the statute could be confined to that special and exceptional form of it. It would not follow, because a given legal arrangement has a unique form, that Congress intended the plain meaning to give way to the unique and special meaning. We shall show, however, that these arguments are

invalid and are based upon elementary misapprehensions of the legal concepts involved. There is nothing unique about general corporate receiverships. We shall show that all receiverships, including general corporate receiverships, differ among themselves depending on the ultimate form of equitable relief to which they are subsidiary, but that they all agree in that they are always incidental to and in aid of such an ultimate remedy, and are never in themselves the final object of a proceeding in equity. The general corporate receiverships are no exception to this. Like all other equity receiverships they are always incidental to some more final statutory or equitable remedy. They differ from other receiverships and among themselves in having different remedial purposes and in being clothed with different powers appropriate to these purposes.

A. *Equity receiverships without exception are incidental to and in subordination of some primary right or remedy which is the subject matter of equitable jurisdiction.*

It is well established that the receivership in equity is always *pendente lite* for the purpose of preserving the status quo for the benefit of all parties, while their respective rights are being adjudicated or for the purpose of carrying out the decrees of the court thereafter. It is always thus an instrument in a larger purpose and never an end in itself. There are an indefinite variety of such purposes—to wind up the affairs and liquidate the assets of a corporation, to take possession of the assets and temporarily to conduct the business because of mismanagement, fraud, incompetence, illegality, etc., pending the adjustment of conflicting rights and equities; to take possession of and manage property against which a lien is sought to be established and enforced. These are only some of the manifold purposes for which receivership may be used. The

only way to describe an equity receivership is by reference to and in terms of the rights being adjudicated and the primary remedy which is the object of the litigation. It is impossible, therefore, to speak of "an equity receivership" standing by itself and without reference to the remedy to which it is auxiliary. To speak as the petitioner does of *an* equity receivership without further characterizing it in terms of more ultimate forms of relief is therefore strictly meaningless. The term "receivership" necessarily imports relation to some more ultimate remedial purpose.

In *Gordon* v. *Washington* (April 1, 1935), U. S., 79 L. Ed. 626, the court said, per Stone, J. (p. 630):

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriate asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition."

In re Surf Bldg. Corp., U. S. Dist. Ct., E. D. Ill., Oct. 17, 1934, C. C. H. 1171:

> "It is insisted that an equity receivership, growing out of a foreclosure proceeding which vests in the receiver of a court of equity the custody and possession of all the assets of the corporation, is not an equity receivership within the meaning of the statute. I have already said in other cases, probably so often as justly to be accused of tiresome reiteration, that a receivership in equity is always incidental to some other ultimate purpose; that equity jurisprudence recognizes no such proceedings as one which has for its only prayer for relief, receivership, but that all receivers in equity are appointed, whether in dissolution of partnerships, in mortgage foreclosure or upon creditors' petition, in subordination of and incidental to the main purpose of the litigation. This court is of the opinion that Congress did not intend, by the provisions of 77B, to limit

jurisdiction under that section of equity receiverships other than those in foreclosure cases. To do so would be to defeat the purpose of the Act in a very important branch of equity jurisdiction."

U. S. v. *Sloan Shipyards Corp.*, 270 F. 613:

Creditors came into court and asked for the seizure of debtor corporation's property by the court through its receiver and for nothing else.

"The receivership applied for in this case is the main object of the suit, and is not ancillary to relief prayed for in the complaint.

Undoubtedly in the Federal Court, to justify the appointment of a receiver, some final relief in equity must be prayed which will justify the court in proceeding. A receivership cannot be considered final relief. It is merely an agency by which the court may reach out and administer assets having relation to the general relief."

Central West Public Service Co. v. *Craig*, 70 Fed. Md. 427, 432:

"The appointment of a receiver is an ancillary, an incidental remedy only, and is not final relief nor is it properly the end or object of the litigation, but is a remedy allowable only in connection with a suit pending for some other purpose in which there is a prayer for ultimate relief which the court has jurisdiction to grant, and to which the appointment of the reeciver is an aid."

Zuber v. *Micmac Mining Co.*, 180 Fed. 625, 627:

"Even though the parties have already agreed upon a receiver, the court is not relieved from looking at the question of jurisdiction, and from inquiring whether the application for receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership, for the mere sake of a receivership. In the case at bar there is no final relief asked for in the bill. A receivership can not be held by this court to be final relief; and it cannot be made final by the suggestion that the receiver may

bring suits, and in that way obtain some ultimate relief. The purpose of a receivership in equity is to be ancillary to, and in aid of, the primary object of the litigation. It cannot be the primary object of the litigation."

B. *No particular form of equity receivership is uniquely entitled to that designation to the exclusion of other receiverships in equity.*

Petitioner's contention that the term "equity receivership" must be reserved for a receiver to liquidate the corporate assets or for any other type of general corporate receiver is therefore without any justification. There is no such thing as *the* equity receivership. There are only equity receiverships in the plural. These can be identified only by reference to their primary remedial object. The liquidation of a corporation or the custody of its assets pending the establishment of a new management are simply particular kinds of remedy in which the receivership functions. Neither the receivership for the purpose of liquidating corporate affairs nor any other type of general receivership for the corporate assets nor any other particular kind of equity receivership is entitled to be regarded as *the* equity receivership *par excellence*, nor is any one kind of general receivership for corporate assets entitled to be regarded as *the* corporate receivership. The receiver appointed to operate the corporate business temporarily because of mismanagement etc., is as much a corporate receiver as a receiver appointed to liquidate the corporate assets. There is no more reason for regarding the liquidating receivership as *the* corporate receivership, than there is for regarding it as *the* equity receivership.

C. *"The general receivership for the assets of a corporation" is not a final or in itself ultimate form of relief but is always instrumental to a specific and more ultimate remedial purpose.*

Just as there is no proceeding for an "equity receivership" without reference to a more ultimate remedial objective, just so is there no general receivership for the assets of a corporation, existing in and for itself. There is no such legal action as a proceeding for a general receivership for the assets of a corporation without a further determination in terms of an equitable or statutory remedy which the receivership is to subserve. Thus there are general receiverships for the liquidation of the assets of a corporation upon its dissolution or insolvency. There are general receiverships for temporarily running the corporate business because of mismanagement of the officers or because of their fraud, illegality, etc. There are as many general receiverships as there are legal purposes for which all of a debtor's property can be placed in *custodia legis*. These general corporate receiverships differ widely among themselves not only in respect of their final remedy but also in respect of the powers with which they are furnished. Thus the receivership for liquidation has ordinarily no power to conduct the business, but has the power to sell the assets. The receivership for conservation ordinarily has power to conduct the business but no power to sell the assets. There is no action for the appointment of a general corporate receiver simpliciter. There is no such legal conception therefore, as *the* "general receivership for the assets of a corporation" by itself and without more, nor is there any equitable remedy where the sole prayer for relief is the appointment of a general receiver for the corporate assets. "General corporate receivership" like the more general term "equity receiver-

ship'' of which it is a species, imports relation to a remedial object standing outside of it and to which it is incidental. It is impossible, therefore, to speak of a general corporate receivership, except as an instrument arising out of and in the course of a final equitable or statutory remedy; it is also impossible to single out one specific kind of general corporate receivership such as the receivership for the liquidation of a corporation and designate it as *the* corporate receivership. This the petitioner has done when he argues at length that equity receivership must mean general receivership for liquidation of a corporation because it is *the* equity receivership, so far as corporations are concerned.

D. *There is no such legal concept as a receivership of the corporate person.*

Petitioner's theory of the unique character of the general receivership for corporate liquidation as well as of other general receiverships for all the corporate assets is based mainly on his assumption that such general receiverships attach to the person of the corporation, whereas, he claims, a foreclosure receivership is always in rem.

The theory of the petitioner's case that ''equity receivership'' must necessarily be confined to the general receivership for the corporate assets is that such a general receivership differs from all others in that it is a receivership *of the corporation itself*, a receivership for the corporate person, whereas other receiverships may involve corporate assets but do not attach to the jural person of the corporate entity. We have already commented upon this colloquialism and pointed out the fundamental importance that it assumes in the petitioner's case.

It is our contention that this colloquialism represents a fundamental misconception of the nature of a general cor-

porate receivership, and that strictly speaking it has no legal meaning whatsoever. These general receiverships, like any other, operate only in rem upon a fund or property. Their only difference from other receiverships is that they operate upon *all* the corporate property. A receivership for the liquidation of a corporation is not a receivership for its dissolution as a corporate entity or even for its custody as a corporate entity. Its sole function is to distribute the property, but it has no legal operation or effect whatsoever upon the corporate legal personality. There is no such legal arrangement as a receivership of the corporation itself.

Speaking of the general receivership for the corporation, Beach Receiverships, Second Edition p. 12, says:

> "They always affect and are directed against *property*, either personal or real, or both."

The Supreme Court of Illinois in *Owen M. Railway* v. *Russell*, 115 Ill. 52, said:

> "The appointment of a receiver for a corporation gives the receiver only temporary management of its affairs under the direction of the court, and the corporation still exists and may, nevertheless, exercise any of its franchise, so long as it does not interfere with the rightful management of its affairs by the receiver as his duties are defined by the court appointing him."

In *Chemical Bank* v. *Deposit Company*, 156 Ill. 522, 429, the court said in speaking of a general receivership for the purpose of liquidating a corporation:

> "The corporate existence of the association is not dissolved and the association as a legal entity continues to exist."

And Beach Receiverships, Second Edition, p. 467, says:

> "The mere appointment of a receiver does not dissolve the corporation, hence it may still sue and be

sued. The effect of the appointment is to sequestrate its property, but the corporation still retains its identity."

And again on page 473:

"Its stockholders continue their existence qua stockholders, and its contracts may be enforced against it. The existence of the corporation is not destroyed or suspended by the action of the court of equity in taking possession of its property and franchise, and it may be sued upon all causes of action upon which it may be or become liable *in personam*, no license from the court being a condition precedent to the bringing of such action."

It follows that in a general receivership for the purpose of liquidating a corporate business or for any other purpose the legal person of the corporation is not in the custody of the receiver or affected by the receivership. *The main ground, therefore, upon which the petitioner distinguishes such general corporate receiverships from all other equity receiverships, falls.* The sole differences between receiverships involving corporate property, whether general or limited, are differences in the remedies which they subserve and in the powers which the court delegates to them to effect their different purposes. One may be for the distribution of the corporate assets among its unsecured creditors; another may be in the course of an enforcement of a lien by secured creditors against pledged property. In none of these, however general its powers, is the corporation personally in custody of the receiver, and none of these therefore, is entitled to usurp the designation "equity receivership" to the exclusion of the others, because of a supposed unique relationship to the corporate person.

V.

PETITIONER'S CONTENTION THAT EQUITY RECEIVERSHIP MUST BE INTERPRETED AS BEING LIMITED TO GENERAL RECEIVERSHIPS FOR LIQUIDATION OF CORPORATE ASSETS, IF SUSTAINED, WOULD RENDER THE TERM "PRIOR EQUITY RECEIVERSHIP" ENTIRELY SUPERFLUOUS IN THE STATUTE.

The petitioner's chief contention on the authority of 2168 Broadway Corp. C. C. H. 3546, is briefly this: that Congress, in specifying a prior equity receivership as the occasion for the filing of a petition under 77B, must have had in mind a liquidating situation and that such a situation is the only sort which should be recognized as justifying proceedings for the relief of debtors. He points out that the term "prior equity receivership" is linked with "prior proceedings in bankruptcy" and is followed by a reference to "acts of bankruptcy," and argues that Congress, therefore, intended to refer in all of these terms to a situation where the assets of the corporate debtor were about to be liquidated and distributed among his creditors.

Section 77B (a) provides that the creditors' petition shall state that "such corporation is insolvent or unable to meet its debts as they mature and if a prior proceeding in bankruptcy or equity receivership is not pending that it has committed an act of bankruptcy within four months." This provision states three alternative requirements only one of which need be satisfied.

1. The existence of a prior equity receivership *plus insolvency or inability to pay debts as they mature.*

2. The existence of a prior proceeding in bankruptcy.

3. The commission of an act of bankruptcy within four months of the filing of the petition under 77B.

It is of crucial importance in the interpretation of these

provisions to observe that the pendency of a prior equity receivership is an alternative requirement to an act of bankruptcy. One of these acts of bankruptcy, Section 3A (5) is that "while insolvent a receiver or a trustee has been appointed or put in charge of his property." This act of bankruptcy has been construed to mean the appointment of a receiver for all the property of the bankrupt for the purposes of liquidation. The fact, therefore, that 77B (a) makes a prior equity receivership an *alternative* requirement" to an act of bankruptcy is a very strong argument that Congress intended to make this provision broader than the provision of the general bankruptcy act. Otherwise the statutory reference to "prior equity receivership" would be entirely superfluous. It is apparent, therefore that Congress did not, by its reference to a prior equity receivership, mean that specific kind of equity receivership which is equivalent to an act of bankruptcy. A petition under 77B (a) may be filed by creditors not only after there is an act of bankruptcy such as the appointment of a general receiver for the purposes of liquidation but also if there is any prior receivership in equity. On no other hypothesis can the phrase "prior equity receivership" be interpreted without redundancy. In conformity with the principle that a statute is to be interpreted so as to give effect, if possible, to every part thereof the term "prior equity receivership" must be given a broader meaning than equity receivership for the liquidation of a corporation which is an act of bankruptcy. This construction gives to each word a definite and reasonable meaning and each word is appropriately used. (*Chicago Home for Girls* v. *Carr*, 300 Ill. 485.)

The court, *In re Broadway Building Corporation*, C. C. H. 3546, failed to take these considerations into account. Instead, it was strongly impressed by the fact that to con-

stitute an act of bankruptcy a receivership must be a general receivership for liquidation or reorganization.

Not only is this parallelism between "equity receivership" and acts of bankruptcy indefensible on general principles of interpretation for reasons just indicated, not only does it, in effect, interpret out of existence the phrase "equity receivership," but it ignores the vital differences between acts of bankruptcy and proceedings to adjudicate in bankruptcy on the one hand, and proceedings under Section 77B on the other. Proceedings under 77B are proceedings before the bankruptcy court, but they are not proceedings for adjudication in bankruptcy. Adjudications in bankruptcy are proceedings looking to the liquidation of an insolvent estate and its distribution among creditors. Section 77B is not a statute of liquidation, but a statute of reorganization. It creates a new form of relief for debtors. For the new proceeding under Section 77B, Congress in Section 77A provided a new and additional jurisdiction, and in Section 77B (a) exhaustively specified the jurisdictional facts pertinent to such new proceeding. If Congress had meant the same jurisdictional requirements to apply to proceedings under Section 77B as to adjudications in bankruptcy, why did it include Sections 77A and 77B (a)? It would have said nothing about "equity receivership pending." It would not have set up exhaustively the jurisdictional requirements for petitions under Section 77B. If it did so it was because it did not wish proceedings thereunder to be bound by the limitations of conventional bankruptcy procedure, but wanted to set up a new form of jurisdiction and a new proceeding which broadens the possibilities of relief by amicable arrangement between harassed creditors and debtors. The fact, therefore, that Section 3(a) sub. 5 refers to a general liquidating receivership offers no parity of reasoning which compels an identical interpretation of Section 77B.

VI.

PETITIONER'S ARGUMENT FROM ANALOGIES DRAWN FROM OTHER PARTS OF THE STATUTE INVOLVES CIRCULAR REASONING IN THAT IT IMPROPERLY ASSUMES "EQUITY RECEIVERSHIP" TO BE IDENTICAL WITH ONE PARTICULAR SPECIES THEREOF, NAMELY GENERAL LIQUIDATING RECEIVERSHIPS.

Petitioner quotes other parts of the statute in which the term equity receivership is used or reference is made to the powers of an equity receiver. He has no difficulty in showing that this means receivers in general and not any particular limited species of receivership. Thus, sub. C2 states that the trustee under 77B shall have the "same powers as those exercised by a receiver in equity." Other sections of the statute deal with the exercise of powers by receivers in equity for the purpose of giving analogous powers to the officers of the bankruptcy courts in certain defined and specified situations. The intention of these provisions is to confer as broad powers as are exercised by *any* receiver in equity, that is to say, powers exercised in receiverships in general. Petitioner then simply assumes receiverships in general to mean a general receiver for liquidating the assets of a corporation, but such general liquidating receiverships as we have seen are only one particular species of the genus, receivers in general. Obviously there is in effect a play here by the petitioner upon the word "general" and an improper identification of "general corporate liquidating receivership" with the term "receivers in general". The consequence of this confusion would be to cut down the powers of such trustees under 77B, because it does not necessarily follow that the powers of general liquidating receivers are greater than the powers of all other kinds in *all* respects. Thus a receiver for mortgaged property in foreclosure proceed-

ings may have wider powers in dealing with the pledged property than a general receiver for liquidating the corporation, whose powers are generally confined to unpledged property and unsecured creditors. And certainly so far as the *jurisdiction* of the court to entertain petitions is concerned, such a confusion between general corporate receivers and receivers in general would result in disastrously restricting it.

After making this improper substitution of general corporate receiver for receivers in general the petitioner proceeds to accuse us of this very impropriety. He contends that we propose to substitute for the term "receivers in equity" the term "receivers in foreclosure proceedings." This is precisely what we have not done and do not do. It is precisely the sort of thing that we object to in his own treatment. It is we who have contended that "equity receivership" cannot be restricted to any particular sort of receivership in equity; that it is a generic and inclusive term comprising all particular kinds of receivers in foreclosure proceedings, general receivers to liquidate corporate assets, general receiverships to carry on corporate business temporarily, etc. These receivers have different duties and different powers. Thus a liquidating receiver may not have power to continue the business, but has the power to sell; the receiver to run the corporate business temporarily because of mismanagement of the officers has the power to conduct the business but not to liquidate it; the receiver in mortgage foreclosure proceedings may have the power to operate and deal with the pledged real estate, a power which the other receivers may not have. It is the petitioner who substitutes for the term equity receivership whenever it occurs in the statute, a particular kind of equity receivership, namely a general receivership for the purpose of liquidating the corporate business. It is not we, but the petitioner who reads arti-

ficial and restrictive limitations into powers of the court's officers when these are constituted by analogy in the statute to the powers of equity receivers in general and into the extent of the court's jurisdiction by identifying the general concept of equity receiverships with one of its particular kinds. His fundamental error in all of this is failure to perceive that a general receiver to liquidate a corporation or for any other corporate purpose, however great its powers, is only a particular kind of receivership in equity.

VII.

AN "EQUITY RECEIVERSHIP" FOR THE PURPOSES OF FILING A PETITION UNDER 77B IS DEFINED BY SUB. (i) THEREOF.

The only kind of a receivership which constituted an act of bankruptcy under the old act was a general receivership under Section 3-A for the purpose of liquidating the business of a corporation. Section 77B (a) by requiring *either* a prior equity receivership *or* an act of bankruptcy, in the alternative, as one of the necessary jurisdictional requirements, clearly intended to make broader and more inclusive the class of equity receiverships which may serve as the occasion for the filing of a petition under 77B. This intention to broaden the provisions of the old Bankruptcy Act is made conclusive by the explicit language of Section 77B in sub. (i) thereof, which provides:

> "If a Receiver or Trustee *of all or any part* of the property of the corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this Section at any time thereafter by the corporation, or its creditors, as provided in Sub. (a) of this Section."

Here we have conclusive corroboration in the terms of the statute itself of our general argument that "equity

receivership" includes all receivers in equity who have custody and administer all or part of the debtor's property. This provision is nothing less than a definition of "equity receivership" for the purpose of filing a petition under 77B.

Subdivision (i) explicitly states that a petition may be filed if *all or any part* of the property of the corporate debtor has been placed in receivership. In the case at bar, substantially all of the property of this corporate debtor is in the hands of a receiver. Although it is therefore in substance and in fact a receivership for the purpose of liquidating all of the property of the corporation, it is unnecessary to insist upon this point in view of the explicit provisions of subdivision (i). There can be no doubt, therefore, if language is to be given its plain meaning, that for the purposes of filing a petition under 77B, an equity receivership includes a receivership for the property involved in a mortgage foreclosure suit, since this is an equity proceeding in which *all or part* of the debtors' property is in the hands of a receiver.

The weakness of the reasoning in *Re 2168 Broadway Corp.*, C. C. H. 3456, becomes distressingly apparent in the Court's discussion of subdivision i. After first appearing to admit the force of the contention that words mean what they plainly say, the court in order to be consistent with the view earlier expressed by it, is forced to adopt a purely fanciful meaning that has utterly no warrant either in the words of subdivision i or in its purpose. That provision, says the court, "contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings." There is nothing in subdivision i that even remotely bears on the question of ancillary proceedings or

on the situation where part of the debtor property is outside the equity court's jurisdiction. Clearly, the Court in *Re 2168 Broadway Corp.* is embarrassed by the express words of the statute and therefore resorts to the desperate expedient of making a pure "conjecture *aliunde.*"

A. *The proviso in Sub. (i) refers to the jurisdictional requirements of sub. (a) other than the existence of a prior equity receivership. On this construction sub. (i) and sub. (a) are completely harmonious.*

A question has been raised concerning the meaning of the proviso of sub. (i): " *as provided in Sub. (a) of this Section.*"

> "If a receiver or trustee of all or any part of the property of the corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this Section at any time thereafter by the corporation, or its creditors, *as provided in Sub. (a) of this Section.*"

Sub. (a) sets forth the jurisdictional requirements for the filing of petitions under 77B. These consist of the following, for petitions by creditors:

1. The corporation must be one of those corporations which could become a bankrupt under Section 4, that is, it must not come within any of the excepted five classes thereof.

2. The petition must be filed by three or more creditors, with provable claims of at least one thousand dollars.

3. The corporation must be insolvent or unable to pay its debts.

4. There must be in the alternative either
   (1) A prior and pending equity receivership;
   (2) A prior and pending bankruptcy proceeding;

or

(3) An act of bankruptcy within four months of the filing of the petition.

5. The petition must be brought in the judicial district where the debtor (1) had its principal place of business for the greater portion of the preceding six months, (2) had its principal assets for the greater portion of the preceding six months, or (3) in any judicial district of the state where it was incorporated.

The effect of the proviso "as amended in Sub. (a) of this Section" is that if there is a receivership, as defined by sub. (i), then a petition may be filed only if all the other jurisdictional requirements contained in sub. (a) are satisfied. By force of this proviso it is not enough that a receiver was appointed for all or part of the debtors' property, in order to qualify the petition. The petitioners must allege the insolvency or inability of the debtor to pay its debts, they must have the proper amount of provable claims against a corporation which does not come within the accepted classes of Section 4, and their petition must be filed in the proper judicial district. The meaning of the proviso under discussion lies in this reference back to the other jurisdictional requirements of sub. (a) which must be satisfied by a petition based on the existence of a prior equity receivership of all or any part of the debtors' property.

What Subdivision i means is that in determining the existence of the necessary jurisdictional facts for creditors petitions under Section 77B, the special or general character of the receivership, whether it be for all or for only part of the debtors' property, is entirely immaterial. Where for example there is a general receivership of the corporation because of mismanagement or fraud for the purpose of conserving the corporate assets pending the appointment of a new set of officers, *and where the finan-*

cial condition and solvency of the corporation is not in issue, a creditors' petition under Section 77B will not lie, despite the fact that there is a general receivership. Insolvency, which is a prime jurisdictional fact, cannot there be alleged. For the purpose of determining jurisdiction under Section 77B, there is no distinction between kinds of equity receivership in respect of their generality, *provided the other jurisdictional requirements set forth in 77B, sub. (a) are satisfied.* These, among others, include the necessity that the corporation shall be insolvent or unable to pay its debts. If this allegation cannot be made, then, whether the corporate receivership be general or special, whether it be for mismanagement or in the course of foreclosure of a mortgage, or for any other purpose, the relief of 77B is not available. But if, on the other hand, a corporation, all or part of whose property has been placed in equity receivership for any purpose, is insolvent or unable to pay its debts and can satisfy all the other jurisdictional requirements of sub. (a), then there is that sort of prior equity receivership which enables creditors to file their petition for relief under 77B.

At this point, it is appropriate also to consider the hypothetical case propounded by the petitioner (pp. 3-4, his brief), where a completely solvent debtor owns a dozen hotels, of which only one is in foreclosure, and in the hands of a receiver. A petition under 77B would lie only if it could be alleged among the other necessary jurisdictional allegations that the corporation was insolvent, or unable to pay its debts. If this be true, there is no difficulty whatever in holding that the corporation is within the purview of sub. (i) and has satisfied the requirements of the proviso "as provided in Sub. (a) of this Section." There is nothing whatever startling or absurd in this consequence, provided it be kept in mind that the corporation must be

insolvent or unable to pay its debts. In the supposed case, a petition under Sec. 77B could not lie even though there is a prior equity receivership, because there is no insolvency.

B. *The rationale of sub-div. (i) is to extend authority of bankruptcy courts under 77B to cases where the equity receivership does not constitute an act of bankruptcy, but where the corporation is insolvent and part or all of its property is in custodia legis.*

The purpose of sub. (i) is this: Whenever *all or part* of the debtor's property is in the custody of a court of equity through its receivers, then, provided the other jurisdictional facts of sub. (a) are satisfied, including insolvency or inability to pay its debts, the bankruptcy court may take jurisdiction over a petition by its creditors under 77B. There is a sound reason for this. Because if all all or part of the debtor's property has come into the custody of a court, it does so because the debtor is involved in conflicting claims and equities. It is in trouble. Its affairs are in an abnormal condition. Its creditors are barred from pursuing their ordinary remedies. The ordinary course of creditor-debtor relationship has been interrupted, and the business and assets of the debtor, wholly or partially, have been taken over for supervision and management by a court of equity. If, under these conditions, the debtor is insolvent or unable to pay its debts, then there is a situation which is properly cognizable in a bankruptcy court in a proceeding for the relief of the debtor under 77B.

The jurisdiction of the bankruptcy court under 77B rests, not on the specific purpose of the receivers custody. The purposes for which property can come into *custodia legis* are indefinitely large in number. They defy enumeration

within the limits of a statutory enactment of this character. They can be characterized and described, as we have seen, only in terms of the primary rights and primary remedies, which are the subject matter of equity jurisdiction and with respect to which a receivership is merely an auxiliary device. Section 77B was not limited in its operation to any one kind or to any specific or enumerated kinds of equity receivership. The fact itself that the device of receivership in equity is being used to place all or part of the debtor's property in the custody of a court of equity establishes the fact that an abnormal condition exists and confers jurisdiction upon the creditors' petition under 77B, provided the other jurisdictional facts of sub. (a) are satisfied, including the insolvency or inability of the debtor to pay its debts.

VIII.

THE EXCLUSION OF MORTGAGE FORECLOSURE RECEIVERSHIPS FROM THE TERM "EQUITY RECEIVERSHIP" WOULD WORK IRREMEDIABLE HARM TO ONE OF THE LARGEST CLASSES OF INVESTORS AND WOULD SHUT OFF ALL POSSIBILITY OF THEIR RELIEF UNDER SECTION 77B UPON THEIR OWN PETITION.

Real estate bondholders are one of the most important classes of creditors in this country, and one of those classes most in need of relief.

In practically all cases where a default has occurred in the mortgage securing their bonds, a foreclosure proceeding in equity has ensued with the appointment of a receiver as the unusual concomitant. No general receivership for the liquidation of the corporation assets has been regarded as necessary or desirable because such general receiverships were intended primarily for the liquidation of unsecured assets among the unsecured creditors and because in practically all cases involving real estate bond issues by

building corporations, the pledged property comprised substantially all of the assets of the debtor. In many cases after foreclosure proceedings were instituted, the corporate existence has been terminated by forfeiture of the charter. A petition for ordinary adjudication in bankruptcy is not available in the ordinary foreclosure of a bond issue against a real estate corporation on the ground of an act of bankruptcy because such acts have occurred long ago, much more than four months before the filing of a petition under 77B. It was to make relief under 77B available to creditors in such situations that Congress made the existence of *any prior equity receivership* a sufficient ground for the assumption of jurisdiction, provided the other jurisdictional requirements were satisfied; and then added sub. (i) expressly granting jurisdiction in cases where *all or part* of the property of the debtor was in the hands of an equity receiver.

A. *It was the intention of Congress in Section 77B to encourage the transfer of proceedings, involving the insolvency of corporate debtors, from the state to the federal courts.*

The new form of relief for corporate debtors, provided in Section 77B, was created because the procedure for corporate reorganizations in ordinary receiverships and foreclosures had broken down. Such proceedings were attended by very long delays, were expensive, cumbersome, and made it possible for designing minorities to prevent reorganizations by insisting on special privileges. Section 77B was passed by Congress to provide a more expeditious procedure and to encourage the transfer of reorganizations from the state to the federal courts. This purpose has been stated by Judge Evans, of the Seventh Circuit Court of Appeals, in *In the Matter of Mabel Messenger Sterba,*

Debtor, October term, 1934, No. 5193, decided January 5, 1935, wherein he said:

> "This section was enacted because of the failure of receiverships to effectuate, and in many instances to attempt, reorganizations. In equity receiverships, on occasions, the jurisdiction of a court was invoked and a receiver appointed where the mortgage vastly exceeded the value of the property and there was no equity of redemption, and yet the receivership was continued for three, four and even five years, with the expenses of the receivership consuming the entire revenue and leaving the bondholders in a worse position each year. The amendments to the Bankruptcy Act, above mentioned, were enacted to remedy the intolerable and seemingly hopeless condition that existed, due to the inadequacy and abuse of the remedy which receivership proceedings afforded, as well as to a desire to help debtors who could not meet their obligations but who entertained a well-founded belief that they would ultimately pay their creditors in full from their properties, the values of which were so drastically reduced."

And again by Judge Lindley, sitting in the District Court for the Eastern District of Illinois, in *In the Matter of Surf Building Corporation, a corporation, Debtor,* No. 252-D, wherein he stated:

> "* * * when one observed the obvious benefits possible in reorganization of corporations by proceedings under 77B, as compared with effectuation of the same result by a court of chancery, whether it be in the State Court or the Federal Court, it necessarily follows that one cannot be charged with bad faith because he approves that method which works with simpler machinery, less expense, great saving of time and greater efficiency of result."

And again in the decision rendered February 26, 1935, by Judge Lindley, in this cause wherein he stated:

> "As the Court has previously pointed out, the intent of Congress apparently was *to give the holders of bonds in default an opportunity to have property securing*

their bonds reorganized in the Federal Court in lieu of liquidation under foreclosure in either the State or Federal Court. Acting in pursuance of that right, the creditors, after patience with long extended foreclosure proceedings, not yet blossoming into decree, have filed their petition in proper form and submitted their evidence. The Court finds that the petition was filed in good faith and should be approved."

Reorganization of real estate corporations under Sec. 77B rather than in foreclosure proceedings in the state courts offers great advantages to all parties concerned. It avoids the entire expense, and in Illinois the intolerable delay of foreclosure, with its accompanying redemption periods. Many a real estate reorganization would have been effected satisfactorily within the last few years if nondepositors could, as they can under 77B, have been compelled to accept securities along with the assenting creditors of the same class, instead of being able to demand cash, the difficulty of securing which made the reorganizations impossible of accomplishment. Another advantage of great importance under 77B is that reorganization thereunder eliminates the necessity of filing registration statements under the Federal Securities Act. All of those who have had experience with such registrations, especially in real estate reorganizations, will realize the tremendous saving in time and expense thus accomplished. The same reason which exempts registration at Washington, namely, that the plan is passed upon, approved and administered under the jurisdiction of the court and found to be fair and equitable in all respects and toward all parties whomsoever, is a reason which will commend itself to bondholders everywhere. It will help to create a feeling of confidence among the holders of securities, and will go a long way toward assisting in the rehabilitation of real estate, which is of fundamental importance to the rehabilitation of business in general.

B. *Section 77B is highly remedial and should be liberally construed to effect the purposes of the legislation.*

In *Campbell* v. *Allegheny Corporation*, C. C. A. 4th C. Md. March 2, 1935, Judge Parker said:

> "*The statute is of a remedial character* designed to facilitate the reorganization of corporate business made necessary by the economic depression through which the country has been passing. *Its purpose should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical interpretation.*"

So inclusive is the purpose of Congress to grant relief to embarrassed business enterprises that petitions under 77B have been approved even where the debtor has ceased to exist as a corporate entity by giving up or losing its corporate charter prior to the petition. *In re* 211 *E. Delaware Place Building Corporation,* which has since been affirmed by the Circuit Court of Appeal, 7th Circuit; *in re Surf Building Corporation,* U. S. District Court, E. D. Ill., October 17, 1934. The ground for these holdings was that Congress under 77B intended to grant relief to the creditors of any corporate debtor. To effect this purpose courts will look beyond the form to the substance. It has been held *in re* 211 *E. Delaware, supra,* that in a real estate bond issue of a building corporation, the real object of the proceedings under 77B is to reorganize and readjust the claims against the property itself and that the proceedings is only incidentally a reorganization of the debtor corporation. The necessary implication seems to be that the reorganization of a real estate corporation is essentially a proceeding *in rem.* As the court said *in re* 211 *E. Delaware, supra*:

> "Nothwithstanding the forfeiture of the corporate charter the property of the debtor must still be distributed. Congress by reason of legislation has ex-

tended the jurisdiction of the District Court to the reorganization of the *res.*"

To refuse relief upon a purely technical ground, even when that ground is the disappearance of the corporate debtor itself, would be to deny large classes of creditors the remedy which Congress intended to put at their disposal. Sections 77A and B were enacted by Congress in the face of a great national emergency which still exists. It is a remedial statute of the highest sort and in accordance with well known principles of statutory construction must be liberally construed.

In the matter of *Harrison Parker, et al.*, 48 A. B. R., 698, Judge Evans, sitting as an acting District Judge, said:

> "(a) The Bankruptcy Act (Comp. St. 9585-9656) *was a general enactment of a remedial character, and shall be liberally construed to effect the purposes of the enactment.* * * * Uncertainty may well arise over the term 'unincorporated company.' Respondents ask the court to give this term of restricted meaning. But should the court do so, if the result of such a construction is to defeat in part, at least, the manifest purpose of the entire enactment?"

Conclusion.

Section 77B nowhere speaks of "general corporate receivership" or of receivership of the corporation itself, but only of "equity receivership," which is the broader, the more inclusive, the generic designation. Even assuming that definite and precise language may be ignored, if the plain meaning of this provision is to be rejected in favor of a highly restricted, special and colloquial meaning, there must be compelling reasons which require the court to do so. All the reasons which petitioner, relying upon *In re 2168 Broadway Corp.*, C. C. H. p. 3546, has produced for disastrously limiting the court's jurisdiction involve mis-

conceptions of the general legal principles and are unsupported by any internal evidence in the statute itself. On the contrary, his construction would interpret "prior equity receivership" as equivalent to an act of bankruptcy. This would render the whole provision redundant, would require creditors to prove the same jurisdictional facts for relief under Sec. 77B as they would have to prove in order to obtain an adjudication in bankruptcy, and would ignore the intention of Congress to create a new and supplementary form of relief.

The statute itself, moreover, explicitly defines the term "receivership" in sub. (i) as receivership *of all or part of* the corporate property. This definitely disposes of petitioner's argument and renders conclusive the results of our discussion on general principles, viz.: that there is no valid argument for restricting the term "equity receivership" to the general corporate receivership in any of its forms, so as to exclude a receivership of *all or part* of the debtor's property, arising out of foreclosure proceedings in equity. On the contrary, every reason of expediency and policy requires the term "equity receivership" to be read in its plain meaning as referring to any receivership in equity, including mortgage foreclosure receiverships. Otherwise the remedial purpose of Section 77B will be completely frustrated with respect to one of the most important classes of creditors.

It is respectfully submitted therefore that the decision of the Circuit Court of Appeals in this cause is in accordance with the law and that the petition for certiorari should be denied.

Respectfully submitted,

FRANK E. MCALLISTER,
MAURICE WALK,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 428.—October Term, 1935.

C. S. Tuttle, Albert J. Petersen, et al., Petitioners,
vs.
Sam Harris, J. Rose, and I. Gordon, Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 3, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy here, as in No. 533, *Duparquet, Huot and Moneuse Co.* v. *Evans,* decided at the same time, is one as to the meaning of the words "equity receiverships" in the statute for the reorganization of debtor corporations. Bankruptcy Act, § 77 B (a); 11 U. S. C., § 207 (a).

A mortgagee brought suit against Granada Hotel Corporation in the Superior Court of Cook County, Illinois, to foreclose a second mortgage upon real property of the corporation located in that state. A receiver was appinted to collect the rents and profits. Thereafter a prior mortgagee, the trustee under a deed of trust to secure an issue of bonds, brought suit to foreclose the prior mortgage, and in accordance with the law of Illinois laid claim to the possession of the property as owner after condition broken. In response to that claim the state court made an order discharging the receiver, and directing that the prior mortgagee be let into possession.

While possession was so held, respondents brought a proceeding under Bankruptcy Act, § 77 B, contending that the possession of the mortgagee was that of an equity receiver or at least equivalent thereto. The District Court upheld that contention, denying a motion by petitioners, who had intervened in the proceeding to dismiss the application (9 F. Supp. 909); and the Court of Appeals for the Seventh Circuit affirmed. 78 F. (2d) 409. A writ of certiorari issued from this court.

An equity receivership within the meaning of the statute does not result from the appointment of a receiver for the collection of

the rents in a suit to foreclose a mortgage. *Duqarquet, Huot & Moneuse Co.* v. *Evans,* — U. S. —. But here there was no receiver either for the collection of rents or for any other purpose. A mortgagee after condition broken under the law of Illinois is the owner of a legal estate, and as such entitled as of right to the possession of the mortgaged premises. *Wolkenstein* v. *Slonim,* 355 Ill. 306. The grantee under the deed of trust was in possession not as receiver, but as owner.

The decree should be reversed, and it is

So ordered.

Mr. Justice VAN DEVANTER took no part in the consideration or decision of this case.